Supreme Court U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

WILL & GRUNDY BUILDING TRADES COUNCIL, AFL-CIO and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO,

Petitioners,

v.

BE&K CONSTRUCTION COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the lower courts erred when they failed to apply the six-month limitations period of § 10(b) of the National Labor Relations Act to damage claims based upon alleged violations of § 8(b)(4) of the Act?

Whether the lower court erred when it affirmed a damage award for alleged lost future profits for competitive bid construction projects which Plaintiff never sought to obtain; which were never demonstrated to be incurred by reason of unlawful activity by the Defendants; and, were never shown to be actually sustained by the Plaintiff, but rather, were simply speculative?

LIST OF PARTIES

Petitioners are the Will & Grundy Building Trades Council, AFL-CIO and the International Union of Operating Engineers, Local 150, AFL-CIO.

Respondent is the BE&K Construction Company.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Will & Grundy Building Trades Council, AFL-CIO, and International Union of Operating Engineers, Local 150, AFL-CIO, pray that a Writ of Certiorari be issued to review a judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on September 18, 1998, as amended by Order entered November 23, 1998.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 156 F.3d 756 (7th Cir. 1998) and is presented in its entirety in Appendix A, *infra* at pages App. 1 through App. 33. The Memorandum Opinion and Order of the District Court is unreported but printed in its entirety at Appendix A, *infra* at pages App. 34 through 45.

The Memorandum Opinion and Order of the District Court relating to the post-trial motions is unreported but printed in its entirety at Appendix A, *infra* at pages App. 46 through 60.

JURISDICTION

The U.S. District Court for the Northern District of Illinois, Eastern Division, entered judgment on April 1, 1997. The U.S. Court of Appeals for the Seventh Circuit affirmed that judgment September 18, 1998. By Order entered November 23, 1998, the Court of Appeals amended that decision. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes involved here are the National Labor Relations Act (NLRA) (as amended), §§8(b), 8(e), 10(b), 10(l), 10(m), 61 Stat. 140, 29 U.S.C. §§158, 160; and the Labor Management Relations Act, as amended, §§301, 303, 61 Stat. 156, 29 U.S.C. §§185, 187. The language of these statutory

provisions is set forth in Appendix B, *infra* at pages App. 61 through 75.

STATEMENT OF THE CASE

Statement of Facts

Local 150 is a labor organization which represents heavy equipment operators and other construction workers in, *inter alia*, Will and Grundy Counties, Illinois (Tr. 18-19; R.Doc. 190, ¶6). In August, 1995, Local 150 employed several business agents, each assigned to a specific geographic area or industry. Local 150 Business Agent Gary Benefield was responsible for Will County (Tr. 459). Local 150 Business Agent Mike Quigley was responsible for Grundy and Kankakee Counties, Illinois (Tr. 310, 460). Quigley also served as President of the Will & Grundy Building Trades Council.

Plaintiff BE&K is a non-union construction corporation headquartered in Birmingham, Alabama (Tr. 17; R.Doc. 190, ¶1). Although BE&K does business internationally, its employees reside primarily in the southern United States (Tr. 427).

Starcon, Inc. is a non-union mechanical contractor which primarily services oil and petrochemical refineries such as UNO-VEN and Mobil in Illinois (Tr. 17-18; R.Doc. 190, ¶4). Mike Uremovich is Starcon's President (Tr. 18; R.Doc. 190, ¶4).

In June, 1994, Starcon contracted with BE&K to provide it skilled craftsmen on an as-needed, as-requested basis (Tr. 392; R.Doc. 190, ¶13). The agreement did not obligate Starcon to use BE&K on any projects; did not prohibit Starcon from entering into similar manpower contracts with other contractors; did not guarantee BE&K any specific number of jobs or volume of work from Starcon; and did not obligate

BE&K to provide manpower to Starcon (Tr. 172-176, 421-422; R.Doc. 190, ¶13).[1]

UNO-VEN operates a gasoline and petro-chemical refinery in Lemont, Will County, Illinois (Tr. 18; R.Doc. 190, ¶5). In July or August, 1995, UNO-VEN awarded a competitive bid to Starcon to perform certain construction work known as a "turnaround" at its facility in September or October (Tr. 21; R.Doc. 190, ¶16). On September 12, 1995, Starcon issued a "work order release" to BE&K for approximately 30 BE&K employees for the turnaround job at UNO-VEN (Tr. 21, 393; R.Doc. 190, ¶17). On September 18, 1995, BE&K craftsmen began working for Starcon at UNO-VEN (Tr. 21-22; R.Doc. 190, ¶18).

On the morning of September 18, 1995, the Local 150 Business Agent responsible for the work at UNO-VEN, Gary Benefield, told Trades Council President Mike Quigley that BE&K was rumored to be at UNO-VEN, so that Quigley could inform Trades Council members (Tr. 213-214, 280-282; R.Doc. 190, ¶19). Later that day, Quigley or Benefield called UNO-VEN Manager Stan Taylor to inquire about the presence of BE&K employees (Tr. 22, R.Doc. 190, ¶20). Taylor responded that he was unaware of BE&K employees at the facility (Tr. 282, 462). Taylor invited them to meet with him at UNO-VEN to discuss the matter further (Tr. 229).

On September 18 or 19, 1995, Benefield and Quigley met with UNO-VEN managers Stan Taylor and Art Klein at the UNO-VEN cafeteria (Tr. 22, 460; R.Doc. 190, ¶21). Quigley identified himself as President of the Trades Council (Tr. 460, 482); those present understood that Quigley acted solely as a representative of the Trades Council and not on behalf of any

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[1] In *Starcon, Inc.*, 323 NLRB No. 168 (1997), the National Labor Relations Board found that Starcon entered into this agreement with BE&K in violation of federal labor law based upon unfair labor practice charges filed by the International Brotherhood of Boilermakers Union. Consequently, it ordered Starcon to cease using BE&K to avoid hiring union members and to offer employment to over 100 Boilermaker members. Starcon has sought review of this decision in the Seventh Circuit.

individual labor union (Tr. 482). Benefield identified himself as a business representative of Local 150 (Tr. 482); those present understood that Benefield acted only on behalf of Local 150 and not any other labor organization (Tr. 482).

Trades Council President Quigley advised Taylor and Klein that BE&K might be performing work at UNO-VEN within the craft jurisdiction of Pipefitters Local 597 or Boilermakers Local 1 (Tr. 216). The UNO-VEN managers understood, however, that any picketing by those labor organizations would be directed against BE&K, not UNO-VEN (Tr. 493). At no time during the Cafeteria Meeting did Quigley or Benefield mention picketing which occurred at UNO-VEN at any previous time (Tr. 345-350).[2] At no time did Quigley or Benefield threaten Klein, Taylor or UNO-VEN with illegal picketing (Tr. 380, 381, 484-485). Klein described Quigley and Benefield as professional and courteous (Tr. 482-483, 485). The gentlemen parted company with handshakes (Tr. 461, 483-484). UNO-VEN's Albaugh testified that he received no reports of any threat of illegal conduct by Local 150 (Tr. 380, 381). Local 150 never had or expressed any intention to picket BE&K or anyone else (Tr. 230-231).

On September 18 or 19, various UNO-VEN managers met to discuss BE&K (R.Doc. 190, ¶22). They understood that any potential labor dispute was with BE&K and no picket would be directed at UNO-VEN (Tr. 493). UNO-VEN sought to prevent any picketing against BE&K at UNO-VEN, even if such pickets were lawful (Tr. 359-360, 361, 372). Consequently, on September 19, UNO-VEN decided to have BE&K removed from the jobsite (Tr. 358). UNO-VEN's Albaugh believed that union tradesmen would not show up for work even if the unions picketed only a gate reserved for BE&K (Tr. 372).

On September 19, UNO-VEN orally instructed Starcon's Uremovich to remove BE&K (Tr. 131, 134). Later that day or

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[2] The spring 1995 picketing at UNO-VEN was referred to as the "Four Seasons picket" (Tr. 345-50).

early the next, Uremovich again met with various UNO-VEN managers, who confirmed that the decision to remove BE&K was final (Tr. 131, 134). Uremovich told UNO-VEN he would inform Trades Council President Quigley of the decision and seek to forestall any union protests (Tr. 132, 207). Shortly thereafter, Uremovich telephoned Quigley and asked him to meet at the Bob Evans Restaurant in Joliet for lunch (Tr. 23, 100, 132). Uremovich said nothing of the meeting's purpose (Tr. 295-296). Before the Bob Evans Meeting, Uremovich consulted with BE&K (Tr. 132).

At approximately noon on September 20, 1995, Uremovich arrived at the Bob Evans Restaurant in Joliet, Illinois (Tr. 133, 153). Before entering, he concealed a micro-cassette recorder inside his Daily Planner and turned it on (Tr. 133-134). Uremovich then states, into the recorder, exactly what he intended to elicit from Quigley (R.Doc. 265 at Plf. Ex. 27 at 1):

> . . . I'm gonna be sitting down to have lunch with uh, Mike Quigley of the Operating Engineers Local 150 and uh, we're gonna discuss the uh, situation at the UNO-VEN Refinery and the uh, operators' threat to uh, put up pickets or, or take action against Starcon and, and/or BE&K. . . .

Shortly thereafter, Quigley arrived (R.Doc. 265 at Plf. Ex. 27 at 2). Uremovich and Quigley met for approximately one hour and discussed many issues (R.Doc. 265 at Plf. Ex. 27). Quigley attended this meeting as President of the Trades Council (Tr. 242). Quigley never stated that he was representing any other labor organization (R.Doc. 265 at Plf. Ex. 27).

Uremovich never advised Quigley that he was taping the conversation (Tr. 133, 135);[3] nor did he tell Quigley of UNO-VEN's decision or seek help in preventing a protest before

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[3] On or about May 28, 1997, a Will County, Illinois, grand jury indicted Uremovich for violating the criminal provisions of the Illinois Eavesdropping Act, 720 ILCS 5/14-1, *et seq.*, when he surreptitiously taped the conversation with Quigley.

BE&K left (Tr. 132, 135). Instead, Uremovich repeatedly raised the subject of BE&K's continued presence at UNO-VEN (R.Doc. 265 at Plf. at Ex. 27). At no time did Quigley threaten Starcon with any illegal picketing if BE&K remained at UNO-VEN (Tr. 145-146). Quigley offered to intercede on Starcon's behalf with its ongoing dispute with the Boilermakers (Tr. 148-149, 344). At no point did Quigley raise his voice, and the meeting ended with both men laughing (Tr. 468, R.Doc. 265 at Plf. Ex. 27 at 27).

After the Bob Evans Meeting, Uremovich returned to UNO-VEN (Tr. 120, 135). Uremovich again told UNO-VEN that he would buy some time to remove BE&K (Tr. 121). Uremovich continued to report back to BE&K (Tr. 132).

In a letter to Starcon dated September 23, UNO-VEN confirmed its decision to remove BE&K from the job site (R.Doc. 27 at Def. Ex. 16). Nothing in the letter states or implies that any union threatened UNO-VEN with illegal picketing (*id.*). Local 150 or any other labor union never picketed BE&K, Starcon or UNO-VEN at UNO-VEN (Tr. 419, 426-427).

In October, 1995, Uremovich traveled to BE&K's Birmingham, Alabama, office to meet BE&K's General Counsel Fred Garrick (Tr. 141). At this meeting, Uremovich played his tape of the Bob Evans Meeting (Tr. 141). Uremovich claimed that he met with BE&K to tell them Starcon would not use them on any future projects because of Quigley's statements (Tr. 123).

Proceedings in the Courts Below

On or about September 18 or 19, 1995, Plaintiff BE&K learned it had been expelled from a construction job site at the UNO-VEN refinery in Lemont, Illinois. On March 19, 1996, BE&K sued the Trades Council for damages under federal and state law.

On June 17, 1996, BE&K moved to amend its Complaint to add as Defendants Local 150, Local 422, Local 597 and Local 1. On July 15, 1996, the Court granted that motion.

On July 31, 1996, Local 150 moved to dismiss the claims against it. On September 23, 1996, the District Court granted that motion in part, dismissing that portion of BE&K's Complaint which alleged violations of 29 U.S.C. §158(b)(4)(B)(i)(B) (BE&K has not appealed that ruling); but denied that part of the motion asserting BE&K's claims were untimely.

On December 17, 1996, Defendants moved for summary judgment. On February 20, 1997, the District Court entered judgment for Defendants Local 422, Local 597, and Local 1; and entered partial summary judgment on behalf of Trades Council and Local 150 on Plaintiff's state-law claims. BE&K has taken no appeal from this order.

Beginning on March 25, 1997, the District Court tried BE&K's claim under 29 U.S.C. §187 against the Trades Council and Local 150 to a jury. At trial, BE&K asked for approximately $70,000 in damages for the loss of the UNO-VEN job and $1,200,000 to $1,499,000 for lost future profits (Tr. 31, 701). On April 1, 1997, the jury returned a $544,000 verdict in favor of BE&K against both Defendants.

On April 15, 1997, Defendants filed timely post-trial motions pursuant to Fed. R. Civ. P. 50 and 59 seeking the entry of judgment as a matter of law, a remittitur, or, alternatively, a new trial. On June 17, 1997, the District Court denied those motions.

On July 7, 1997, Local 150 filed a timely notice of appeal to the United States Court of Appeals for the Seventh Circuit appealing from the final judgment entered by the District Court on June 17, 1997, the Court's April 1, 1997 Order entering judgment on the jury verdict, and all prior interlocutory orders.

On September 18, 1998, the United States Court of Appeals for the Seventh Circuit affirmed that judgment. On October 2, 1998, Petitioner timely petitioned the Court of Appeals for a rehearing with suggestion of rehearing *en banc*. By Order entered November 23, 1998, the Court denied the

petition for rehearing and suggestion for rehearing *en banc*, but amended the September 18, 1998 decision.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION IGNORES THE PLAIN AND OBVIOUS INTENT OF CONGRESS

Section 303(a) of the LMRA, 29 U.S.C. §187(a), provides an action for damages to anyone injured by a labor organization which engages in "any activity or conduct defined as an unfair labor practice in Section" 8(b)(4) of the Act, 29 U.S.C. §158(b)(4). While §303 contains no limitations period, §10(b) of the NLRA does. 29 U.S.C. §160(b). Hence, any unfair labor practice charge alleging a violation of the NLRA filed more than six months after it accrued is time-barred. *DelCostello v. Teamsters*, 462 U.S. 151 (1983). *Landgrebe Motor Transport v. District 72, Machinists*, 763 F.2d 241, 244 n.1 (7th Cir. 1985); *Sheet Metal Workers v. NLRB*, 989 F.2d 515, 519 (D.C. Cir. 1993); *Carpenters Local 1620*, 208 NLRB 94 n.2 (1974).

The NLRA originally contained no limitations period. When Congress enacted the so-called Taft-Hartley amendments to the Act, it created, *inter alia*, the union unfair labor practices codified under §8(b); the damage option for violations of §8(b)(4) under §303; and the six-month limitations period of §10(b). That all these amendments were considered a part of the same legislation strongly indicates a Congressional intent that they be considered together. That Congress expressly limited the time for filing an unfair labor practice charge under 8(b)(4) to six months indicates it considered any alleged violation occurring outside the 10(b) period to be non-actionable. Nothing in the legislative history, the logic of the law, or the statute itself suggests that Congress intended any other limitations period than §10(b) to apply to claims under §8(b)(4). Indeed, the fact that the opponents of the Taft-Hartley amendments considered the six-month limitation too short makes it most ironic that the employers will now enjoy

an implied exception to this Rule. *See, e.g.*, Statement of Senator Robert F. Wagner, 93 Cong. Rec. 3427.

Nor is there any question Congress considered resolution of alleged violations of §8(b)(4) to be of utmost urgency. At the same time Congress enacted the 8(b)(4) secondary boycott prohibitions, it authorized the Board to consider such charges a priority and required it to seek injunctive relief. Under §10(l) (29 U.S.C. §160(l)):

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of Paragraph (4)(A), (B) or (C) of §158(b) of this title or §158(e) of this title or §158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States District Court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter.

Similarly, under §10(m) entitled "Priority of Cases," 29 U.S.C. §160(m), Congress again specified that cases for which §10(l) relief may be sought shall be given priority over all other cases. The significance of this latter point is worth emphasizing. Under the Norris-LaGuardia Act, the Federal Courts are expressly barred from entering injunctions in labor disputes except under very limited circumstances. *See* 29 U.S.C. §101, *et seq.*; *Buffalo Forge Co. v. United Steelworkers of America, AFL-CIO*, 428 U.S. 397 (1976). Any injunctive relief is an extraordinary remedy requiring proof of irreparable harm. *Kinney v. Local 150, IUOE*, 994 F.2d 1271

(7th Cir. (1993). To *require* the NLRB to seek injunctive relief where only "reasonable cause" to believe a violation of §8(b)(4) has occurred is clear proof of Congress' view of the urgency of such matters, and therefore of its intent to limit all claims based upon unfair labor practices to six months.

II. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THIS COURT'S *DELCOSTELLO* DECISION

Section 303 expressly requires damage claims be brought under "the limitations and provisions of" §301 of the LMRA. 29 U.S.C. §§185, 187. Relying on *DelCostello*, the Seventh Circuit's first occasion to comment on this issue it indicated "Presumably this means that the statute of limitations applicable to §301 claims is applicable to §303 claims." *Landgrebe*, 763 F.2d at 244 n.1. The *Landgrebe* Court declined to rule on §10(b)'s applicability because the parties failed to raise the issue. *Id.*

As C.A. Wright, A.R. Miller, E.H. Cooper, 19 *Federal Practice and Procedure: Jurisdiction* 2d. §4519 at 595 (West 1996) puts it, before *DelCostello*, "the standard and almost universal answer to" the question where a federal court should look to supply a limitations period for a federal statute lacking one has "long has been that the federal court should look to the law of the forum state." *DelCostello* noted, however, that this seemed to be simply a "fall back rule of thumb." 462 U.S. at 160 n.12. Indeed, "[i]n an increasing number of contexts, federal courts have found that related provisions of federal law provide the best sources for borrowing statutes of limitations." Wright, *et al.*, *supra* at 697.

DelCostello provides the most appropriate road map for federal courts seeking to identify whether state or federal law provides the most analogous limitations period. *Federal Practice and Procedure*, *supra* at 600-601. *DelCostello* first asked whether the federal claim needing a limitations period was more analogous to a state claim or some other federal claim. *Id.* at 600. It concluded that a §301 claim for wrongful

termination/unfair representation was substantially unlike actions to vacate an arbitration award or legal malpractice. Second, *DelCostello* identified the federal policies which would be impeded by applying a state statute of limitations: the federal interest in providing redress to wrongfully-terminated employees, and the national labor policy favoring rapid resolution of labor-management disputes. While 90 days was too short, three years was too long. In balancing those interests, the Court reasoned that the federal statute of limitations under §10b of the NLRA was "actually designed to accommodate a balance of interests very similar to that at stake here." *DelCostello*, 462 U.S. at 169. As the Court concluded (*id.* at 171-172):

> When a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial law making, we have not hesitated to turn away from state law.

Likewise, this is precisely the approach taken by the Circuit Courts of Appeal in a variety of labor contexts. *Johnson v. Graphic Communications International Union*, 930 F.2d 1178 (7th Cir. 1991); *United Food & Commercial Workers Local 100A v. John Hofmeister and Son, Inc.*, 950 F.2d 1340 (7th Cir. 1991); *Communications Workers of America v. AT&T*, 10 F.3d 887, 889 (1999); *Communications Workers of Am. v. Western Elec. Co., Inc.*, 860 F.2d 1137 (1st Cir. 1988); *Associated Brick Mason Contractors of Greater New York v. Harrington*, 820 F.2d 31 (2d Cir. 1987); *Federation of Westinghouse Independent Salaried Unions v. Westinghouse Elec. Corp.*, 736 F.2d 896 (3d Cir. 1984); *Aluminum, Brick and Glassworkers Int'l Union Local 674 v. A.P. Green Refractories, Inc.*, 895 F.2d 1053 (5th Cir. 1990); *McCreedy v. Local Union No. 971*, 809 F.2d 1232 (6th Cir. 1987); *General Teamsters Union Local No. 174 v. Trick & Murray, Inc.*, 828

F.2d 1418 (9th Cir. 1987).[4] In all cases, the Court of Appeals applied the six-month limitation period of §10(b) of the NLRA. In *Johnson*, the Court explained that comparing the allegations of plaintiffs' fraudulent misrepresentation claim "to an unfair labor practice claim for breach of the duty of fair representation convinces us that the two are not just closely analogous, but identical." 930 F.2d at 1181. Similarly, because a "refusal to arbitrate involves a termination without cause, which is an unfair labor practice under the NLRA. . . . It seems particularly appropriate to borrow the NLRA limitations period." *Local 100A*, 950 F.2d at 1348.

Furthermore, *Local 100A* explained, although the most closely analogous Illinois limitations period was that for breach of contract claims, suits to compel arbitration were "irrevocably tied to federal labor policy;" and therefore the policy considerations favoring prompt resolution of labor disputes were controlling. The five to ten-year limitations periods applicable to breach of contract claims were "simply too long to allow industrial disputes to fester." *Local 100A*, 950 F.2d at 1348, quoting *Associated Brick Mason Contractors v. Harrington*, 820 F.2d 31, 37 (2nd Cir. 1987). In *Johnson*, the Court explained, 930 F.2d at 1182 (citations omitted):

> . . . federal policies and the practicalities of litigation make the 6-month statute of limitations "a significantly more appropriate vehicle for interstitial lawmaking than a 2-year rule borrowed from state law . . . the elements Congress balanced when it fashioned the limitations period of §10(b) are the same elements to be balanced in this case. The 6-month limitations period in §10(b) was adopted in order to "bar litigation over past events" after records have been destroyed, witnesses have gone

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[4] *See, also, In Re Data Access Systems Securities Litigation*, 843 F.2d 1537, 1543-1545 (3rd Cir. 1988) (borrowing federal statute of limitations from elsewhere in Securities Act of 1934 in connection with §10b-5 suit).

> elsewhere, and recollections of the events in question have become dim and confused.

The Court observed that adopting the §10(b) six-month limitations period also ended the uncertainty associated with federal courts searching "for more or less analogous state statutes on a case-by-case basis." *Id.* Particularly where "garden variety' business disputes could be characterized any number of ways, including fraud, breach of contract or tortious interference, a multiplicity of limitations periods and their equitable tolling doctrines created "a crazy quilt of state statutes." *Id.* at 1182-83. Application of state statutes was "problematic" when they are the only source; but where there is "available a federal statute of limitations actually designed to accommodate a balance of interests very similar to that at stake here" federal law is more appropriate. *Id.* at 1183.

This Court most recently addressed the issue of the proper source of the limitation period for a civil action under a federal statute which does not contain a limitation period in *North Star Steel Co. v. Thomas*, 515 U.S. 29 (1995). In *North Star*, this Court declined to apply a federal limitation from elsewhere in federal law to an action brought under the Worker Adjustment and Retraining Notification Act (WARN) 29 U.S.C. §2101, *et seq.* However, in so doing, the Court reaffirmed the *DelCostello* principle that the Court will decline to follow a state limitation period, *id.* at 35 (citations omitted):

> . . . When a rule from elsewhere in federal law clearly provides a closer analogy than available state statute, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking.

However, the very reason why the Court declined to apply an analogous federal limitation period to actions under the WARN Act mandates its application to actions under §303.

In *North Star*, the Court noted that the petitioner failed to show that the state limitations periods were either too long or too short. *Id.* at 36. However, under §303, the state limitations

period provides an employer with far greater time to seek damages than Congress specified for pursuing an action under §8(b)(4) through the National Labor Relations Board. Congress enacting §10(b) at the same time it enacted §8(b)(4) clearly signifies Congress's intent that six months is more than sufficient time to seek a remedy for a violation of §8(b)(4). Nothing prohibits an employer from filing an action under §303 at the same time it files a charge with the National Labor Relations Board. Further, the filing of an unfair labor practice charge is *not* a jurisdictional prerequisite for filing a §303 suit. Indeed, at the time BE&K sued Local 150, it would have been time barred from filing a charge with the NLRB. Permitting a dilatory employer this second opportunity to seek relief for a §8(b)(4) violation is contrary to the expressed Congressional intent that it enacted the 1947 amendments to maintain a balance between employers and labor organizations. *See*, 29 U.S.C. §141.

In addition, in *North Star*, the petitioner did not demonstrate that the federal law provided a closer analogy than the state law. *Id.* at 35-36. In the present case, as stated *supra*, the §303 claim is *expressly* defined by §8(b)(4), which itself is governed by the §10(b) limitation period. In *Agency Holding Corp. v. Malley & Duff Association*, 483 U.S. 145, 153 (1987), this Court applied the limitation period applicable to Clayton Act civil enforcement actions, 15 U.S.C. §15(b), to civil enforcement actions under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1964. There, the Court found the limitation period under an analogous federal law more appropriate than any state limitations period, in part, because "both statutes aim to compensate the same type of injury." *Id.* at 151.[5]

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[5] Similarly, prior to *DelCostello*, this Court has adopted an analogous federal limitation period when necessary. *See*, *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355 (1977) (adopting federal statute of limitations for EEOC enforcement actions); *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958) (federal limitation period applied to unseaworthiness action under general admiralty law).

Here, *DelCostello's* analysis requires applying the six-month limitations period to the §303 claim. First, the §303 claim *is expressly* the claim defined by §8(b)(4) – a claim itself governed by §10(b). Where, as here, the comparison between the claim alleged and an unfair labor practice is "identical," the §10(b) period applies. *Johnson*, 930 F.2d at 1181; *accord*, *Local 100A*, 950 F.2d at 1348; *Erkins v. United Steelworkers*, 723 F.2d 837 (11th Cir.), *cert. denied*, 467 U.S. 1243 (1984) (because 301/DFR claims are also unfair labor practices, §10(b) applies). The Court below erred initially when it ignored this first step of the *DelCostello* analysis and ruled simply on the policy interests identified by the Court there. *BE&K Construction Co. v. Will & Grundy Counties Building Trades Council*, 156 F.3d 756, 763 (7th Cir. 1998).

Next, as is discussed in more detail *infra*, the federal policies implicated here are at least as compelling as in *DelCostello*. An employer has no greater interest in vindicating its rights against a union than an employee-member does (*DelCostello*'s rationale for a limitations period greater than 30 or 90 days); and because the federal policy favoring rapid resolution of labor disputes (*DelCostello*'s rationale for rejecting the three-year legal malpractice limitations period; 462 U.S. at 168) grew out of labor-management disputes. Here, the Congressional policy favoring rapid resolution of labor disputes is not simply analogous, it is controlling.

III. THE COURT OF APPEALS' DECISION IS CONTRARY TO THE NATIONAL LABOR POLICY FAVORING RAPID RESOLUTION OF LABOR DISPUTES

The national labor policy favors the rapid resolution of labor disputes. *DelCostello*, 462 U.S. at 168. Indeed, the national labor policy favoring rapid resolution of labor disputes grew out of the history of often violent struggle working people engaged in to secure for themselves union representation. The Seventh Circuit found this rationale inapplicable because in its view "labor peace will not be disrupted if Section 303 suits are not rapidly resolved."

BE&K, 156 F.3d at 763, quoting *Monarch Long Beach Corp. v. Soft Drink Workers*, 762 F.2d 228, 231 (2nd Cir. 1985).

From the outset, one of Congress's greatest concerns in enacting the National Labor Relations Act in 1935 was "industrial strife." 29 U.S.C. §151. The Act sought to give employees the right to organize and expressly states that collective bargaining is the preferred method of resolving labor disputes as an alternative to industrial strife. As the "Findings and Declarations of Policy" state (*id.*):

> The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining led to strikes and other forms of industrial strife or unrest. . . .
>
> * * *
>
> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring the equality of bargaining power between employers and employees.

That is, Congress expressly understood that industrial disputes arose in large measure between parties having no collective bargaining relationship and sought to promote such a relationship as the alternative to industrial strife. It adopted §10(b) of the Act and its six-month limitations period for the filing of unfair labor practices precisely because the NLRA sought to defuse labor unrest and resolve industrial disputes quickly.

Congress's concern over industrial strife remained paramount when it enacted the Taft-Hartley Amendments to the NLRA, known as the Labor Management Relations Act of

1947. In its "Congressional Declaration of Purpose and Policy," Congress stated (29 U.S.C. §141(b)):

> Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

Those amendments included the prohibitions against secondary boycotts codified in §8(b)(4). Yet, as stated *supra*, in amending the unfair labor practice provisions of the NLRA, Congress expressly adopted the six-month limitations period as well. The addition of a damage remedy under §303 for violation of §8(b)(4) likewise occurred within this Congressional concern to ameliorate industrial strife. *See Local 20, Teamsters v. Morton*, 377 U.S. 252, 258 at n.13 (1964). In rendering "secondary boycotts" unlawful, therefore, Congress knew and anticipated that legal action over such disputes would be undertaken within the six-month period defined by §10(b). To assert now that rapid resolution of labor disputes is only of national concern when parties already entertain a collective bargaining relationship is naive and in error. Application of the six-month limitation period of §10(b) is fully consistent with Congressional intent, the structure of the Act and the Supreme Court's analysis in *DelCostello*, and this Court should so conclude.

The cases the lower Court relied upon in applying a five-year limitations period to BE&K's claim against Local 150 – *Monarch Long Beach Corp. v. Soft Drink Workers*, 762 F.2d 228 (2nd Cir. 1985); *Prater v. United Mine Workers*, 793 F.2d 1201 (11th Cir. 1986); *Carruthers Readi-Mix, Inc. v. Cement Masons*, 779 F.2d 320 (6th Cir. 1985); *Park Electric Company v. IBEW Local 701*, 593 F.Supp. 1060 (N.D. Ill. 1984) – all

simply misapply the Supreme Court's analysis in *DelCostello*. First, *Carruthers* and *Park* overlook that the §303 claim depends expressly upon commission of an unfair labor practice, analogize that claim directly to state-law torts, and apply state limitations periods. *Carruthers*, 779 F.2d at 324; *Park*, 593 F.Supp. at 1064. The appellate courts in *Monarch* and *Prater* (which simply adopts *Monarch*'s reasoning, 793 F.2d at 1209), correctly observe that a §303 claim "depends on the commission of an unfair labor practice by the union, specifically a secondary boycott. . . . " *Monarch*, 762 F.2d at 231; *Prater*, 793 F.2d at 1209-1210. *Monarch* then errs in misunderstanding the national labor policy favoring rapid resolution of labor disputes (762 F.2d at 231):

> The dispute upon which liability is predicated is not a collective bargaining dispute; it does not arise within the context of a labor-management relationship. Labor peace will not be interrupted if §303 suits are not rapidly resolved.

The national labor policy which favors rapid resolution of labor disputes is by no means limited to those disputes arising in an existing collective bargaining relationship. Indeed, as *DelCostello* itself states, (461 U.S. at 163) (emphasis added), "It is those consensual processes that federal labor law is chiefly designed to promote – *the formation of* the collective agreement and the private settlement of disputes under it." The formation of a collective bargaining agreement expressly anticipates strikes and picketing as unions apply economic pressure to employers. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181 (1967) ("the economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms . . . "). Indeed, it is in precisely those such disputes in which unions most often run afoul of the prohibitions against secondary boycotts. *See e.g., Landgrebe*, 763 F.2d at 243 (defendant union on strike for contract); *Boxhorn's Big Muskego Gun Club, Inc. v. Electrical Workers Local 494, et al.*, 798 F.2d 1016, 1018 (7th Cir. 1986) (handbilling seeking boycott of business for using non-union contractor); *Mautz & Oren v. Teamsters Local 279*,

882 F.2d 1117, 1119 (7th Cir. 1989) (picketing non-union contractor for refusal to sign contract); and which require the most rapid resolution of labor disputes. For that reason Congress has directed the NLRB to accord its *highest* priority to investigation of charges alleging violations of §8(b)(4) and §8(b)(7). 29 U.S.C. §160(l).

Here, the lower court erred by applying the five-year Illinois limitations period applicable to actions in tort (R.Doc. 144 at 8). The Seventh Circuit's admonition that five years is "simply too long to allow industrial disputes to fester," *Local 100A*, 950 F.2d at 1348, is particularly pertinent here,[6] and the Court should find BE&K's claims against Local 150 time barred.

IV. THE LOWER COURT'S RULING POTENTIALLY ESTABLISHES TWO DISTINCT LIMITATION PERIODS FOR ACTIONS BROUGHT UNDER §303

The lower court and the cases upon which it relies decline to apply *DelCostello* by asserting that the *DelCostello* limitations period should only apply in contexts involving a labor-management relationship under an existing collective bargaining agreement. *BE&K* at 763, citing, *Monarch*, 762 F.2d at 231; *Carruthers*, 779 F.2d at 326. As stated, *supra*, Petitioner believes that such a narrow reading of *DelCostello* is erroneous.

However, even assuming that this court agrees that *DelCostello*'s 10(b) limitations should apply only to situations involving an existing collective bargaining relationship, such an interpretation would lead to two distinct limitation periods under §303. As stated, *supra*, §303 provides for a damage remedy for whomever is injured by a violation of §8(b)(4) of the Act. Section 8(b)(4) of the Act prohibits

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[6] *See, also, Westinghouse*, 736 F.2d at 901 (application of a six-year state statute of limitations [to action to compel arbitration under §301] "stretches out industrial disputes far longer than most recent cases have deemed desirable").

unlawful union activity which has one of the following four objects, 29 U.S.C. §158(b)(4):

> (A) Forcing or requiring an employer or self-employed person to join a labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;
>
> (B) Forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with the labor organization as the representatives of its employees . . . ;
>
> (C) Forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of Section 159 of this title;
>
> (D) Forcing or requiring any employer to assign particular work to employees of a particular labor organization or to a particular trade, craft or class rather than to employees in another labor organization or another trade, craft, or class while such employer has failed to conform to an order or certification of the Board that determined that bargaining representative for employees for such work;
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> * * *

Nothing contained within §8(b)(4) limits its applicability to employers who are *not* bound to a collective bargaining agreement with a labor organization. Similarly, nothing within §303 limits who can bring such actions to employers who are *not* bound to a collective bargaining agreement with a labor organization. Rather, such provisions protect employers signatory and non-signatory alike with equal force.

Here, the lower courts erroneously concluded that actions under §303 for alleged secondary boycott activity "involves parties who are otherwise completely unrelated . . . [I]t does not arise within the context of a labor management relationship" *BE&K*, 156 F.3d at 763. However, that is not always the context. *See*, *Mautz & Oren v. Teamsters Local 279*, 882 F.2d 1117, 1121 (7th Cir. 1989) (action brought by signatory contractor against union with whom it was bound to a collective bargaining agreement for violation of reserved gates); *Pickens-Bond Construction v. United Brotherhood of Carpenters*, 586 F.2d 1234, 1237 (8th Cir. 1978) (two contractors brought action against union with whom they were bound to a collective bargaining agreement for unlawful secondary activity). *See*, *also*, *Morton*, 377 U.S. at 253 (action brought by contractor against union which represented its employees for alleged secondary activity during strike over new contract). Moreover, claims under §303 brought for violations of §8(b)(4)(A) and §8(b)(4)(D) almost always arise in the context of an existing collective bargaining agreement. *See*, *Frito-Lay, Inc. v. Local U. No. 137, Intern. Broth.*, 623 F.2d 1354, 1356-1357 (9th Cir. 1980) (action brought by contractor against union which represented its employees for violations at §8(b)(4)(A) during strike over new contract); *American Bridge Div., U.S. Steel v. Intern. Union*, 772 F.2d 1547 (11th Cir. 1985) (section 303 action brought by union contractor for union's violations of §8(b)(4)(D)); *see*, *also*, *NLRB v. Radio and Television Broadcast Engineers Local 1212*, 364 U.S. 573, 582 (1961) (wherein the court noted that the most common situation out of which a jurisdictional dispute under §8(b)(4)(D) arises is where the employer has collective bargaining agreements with two unions, both of which represent employees capable of doing the particular assignment).

Since the lower court, and the cases it relied upon, declined to apply *DelCostello* only because it determined that §303 activities at issue did not involve parties to a collective bargaining agreement, it may be inferred that those courts would have applied the *DelCostello* analysis to §303 suits

brought by an employer who is bound to a collective bargaining agreement with a labor organization. Yet, a non-union employer has no greater interest in vindicating its rights against a union than a union employer does. Further, creating separate limitation periods is contrary to the Congressional intent that §303 was to provide a *uniform* remedy for claims arising from peaceful secondary activity. *Morton*, 377 U.S. at 260-261. Accordingly, to avoid the danger of creating two distinct limitation periods under §303 and to encourage the rapid resolution of any labor dispute, this court should adopt the §10(b) six-month limitation period to actions brought under §303 and find BE&K's claims against Local 150 time barred.

V. THE LOWER COURT ERRED IN APPROVING THE DAMAGES AWARD AND ITS DECISION CONFLICTS WITH THIS COURT AND OTHER SELECTED CIRCUIT LAW

§303 provides in pertinent part, 29 U.S.C. §187 (emphasis added):

> . . . Whoever shall be injured in his business or property by reason [of] any violation of [29 U.S.C. §158(b)(4)] may sue therefor in any district court of the United States . . . and shall recover *the damages by him sustained* and the costs of the suit.

Accordingly, §303 permits an injured party to recover the actual damages sustained by reason of a violation of §8(b)(4) of the Act. Indeed, in *Local 20, Teamsters v. Morton*, 377 U.S. 252 (1964), the court stated clearly that damages recoverable under §303 "should be limited to actual, compensatory damages." *Id.* at 260. Further, the Plaintiff is only entitled to damages caused by reason of the unlawful activity and may not obtain "damages proximately caused by lawful, primary activities, even though the petitioner may have contemporaneously engaged in unlawful acts elsewhere." *Id.* at 261-262. Accordingly, courts following *Morton* have stated that a plaintiff must demonstrate that it was injured by reason of the

unfair labor practice and there is a "causal nexus" between the §8(b)(4) violation and the injury. *Tresca Brothers Sand & Gravel v. Truck Drivers Local 170*, 19 F.3d 63, 65 (1st Cir. 1994); *Boxhorn's Big Muskego Gun Club, Inc. v. Electrical Workers Local 494, et al.*, 798 F.2d 1016, 1020 (7th Cir. 1986). Therefore, the "guiding principle in establishing Section 303 damages is neither punishment nor speculation." *American Bridge*, 722 F.2d at 1553. Here, the lower court erred in affirming a damage award of lost future profits which BE&K failed to show were incurred by reason of unlawful conduct by the union or were actually sustained by BE&K.

Over 95% of BE&K's claimed damages were for lost future profits (Tr. 31, 701).[7] Yet, BE&K offered no relevant data to show that it suffered **any** lost profits. A compensatory damages award cannot be "pulled . . . out of a hat," *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158, 1165 (7th Cir. 1987), *cert. denied*, 486 U.S. 1005 (1988); it "must rest on 'a just and reasonable estimate of the damage based on relevant data.' " *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 506 (7th Cir. 1992). BE&K and Starcon were partners on three projects in June-December 1994 (Tr. 20-21, 31, 84-85, 162-63, 392-93). In 1995, they collaborated only on the September UNO-VEN job (Tr. 21-22). Joint Starcon/BE&K bids on other projects were rejected (Tr. 443-44). Mobil rejected Starcon's November 1995 proposal to use BE&K as a subcontractor as too expensive (Tr. 512-14).[8]

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[7] In its opening statement, BE&K asked for $70,000 in damages for the loss of the UNO-VEN job and $1,200,000 for lost future profits (Tr. 31). In its closing statement, BE&K modified its request and asked for $68,000 for the loss of the UNO-VEN job and $1,499,000 for lost future profits (Tr. 701).

[8] BE&K failed even to prove that the unions' actions terminated its relationship with Starcon, and thus proved no lost future profits. Uremovich testified that Starcon decided not to use BE&K because of the unions' threats (Tr. 123). This was refuted by Uremovich's November 7, 1995 letter to Keith Schwerha of Mobil, one of Starcon's largest customers, proposing that BE&K work with Starcon at Mobil (Tr. 186-90, 512-14; R.

BE&K introduced ***no*** evidence of the revenues received or profits earned on ***any*** of the four jobs. No profit and loss statements, accounting business records, or even testimony about revenues and profits earned, were introduced for any of the jobs. The record is **devoid** of any accounting evidence that BE&K ever earned a **dollar** of profit on its 18-month, waning business relationship with Starcon. There is thus no foundation for BE&K's lost future profits claim.

The record also does not show the number of hours worked on any of the jobs. Nor did BE&K offer trial testimony (let alone historically supported evidence) that it would have done 75,000 man-hours of work for Starcon annually. As for the five-year period BE&K chose for projecting lost profits, BE&K's principal damages witness, Jack Tadlock, the manager of its Boiler Department (Tr. 17, 385), admitted that was "just a number that I would use" and that he could have chosen three months or ten years instead (Tr. 424). This arbitrary, irrational choice of a damages period provides no basis for any damages award, let alone the huge $544,000 jury verdict. *See*, *Mid-America Tablewares, Inc. v. Mogi Trading Co., Ltd.*, 100 F.3d 1353, 1368 (7th Cir. 1996); *Boxhorn's*, 798 F.2d at 1021-23. "Judges and juries must not be casual with other people's money." *Avitia v. Metropolitan Club of Chicago*, 49 F.3d 1219, 1229 (7th Cir. 1995).

There was thus no basis for BE&K's claim that it would have obtained $1.5 million in profits over five years, or for the jury verdict. BE&K, having failed to prove or quantify

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Doc. 270 at Def. Ex. 18). It was written **48 days** after the Bob Evans meeting (R. Doc. 225-2 at Plf. Ex. 27 at 1), at which Uremovich claims that defendants, through Mike Quigley, threatened him. BE&K failed to rebut this showing that its business relationship with Starcon continued, and that BE&K did not receive the next Mobil project solely for economic reasons. Mobil engineer Schwerha, a neutral witness, testified without contradiction that he was in charge of making the decision, and that he rejected BE&K because it was too expensive (Tr. 512-14). The lower court decision makes **no mention** of Schwerha's testimony or his role as the decision-maker. *BE&K*, 156 F.3d at 769-771.

any actual damages to itself, is not entitled to recovery, since a §303 plaintiff may only "recover the damages by him **sustained**. . . . " 29 U.S.C. §187(b) (emphasis added). Accordingly, the lower court decision is in conflict with *Morton*, because BE&K failed to show that it sustained such lost future profits by reason of the union's unlawful actions.

Next, the lower court's decision is in conflict with decisions of other circuits regarding lost future profits for competitively bid projects in the construction industry. As indicated, although BE&K and Starcon entered into an agreement under which BE&K would provide Starcon with craftsmen on an as-needed, as-required basis, there was no identified dollar amount or volume of work that Starcon would generate for BE&K under that agreement (Tr. 392; R.Doc. 190, para. 13). Indeed, the agreement did not obligate Starcon to use BE&K on any projects; did not prohibit Starcon from entering into similar manpower contracts with other contractors; did not guarantee BE&K any specific number of jobs or volume of work from Starcon; and, did not obligate BE&K to provide manpower to Starcon when requested (Tr. 172-176, 421-422; R.Doc. 190, para. 13). Starcon sought its work on projects such as UNO-VEN or Mobil through competitive bidding (Tr. 177-179).

Moreover, in the matter of *Starcon, Inc.*, 323 NLRB No. 168 (1997), the National Labor Relations Board found that Starcon entered into this agreement with BE&K in violation of federal labor law. *Id.* at 11. Indeed, the Board found that "but for its refusal to hire applicants who are union activists, Starcon would have had no need to use BE&K employees." *Id.* Consequently the NLRB ordered Starcon to offer immediate employment to union-affiliated individuals whom Starcon unlawfully refused to hire. *Id.* at 12. Further, the NLRB ordered Starcon to *cease* using BE&K or other subcontractors to avoid hiring union-affiliated applicants. Accordingly, Starcon does not have unlimited discretion when it may utilize BE&K; rather, any future use of BE&K by Starcon must not be in violation of the NLRB award.

Both the Ninth and the Tenth Circuits have declined to approve damages for lost future profits based on the lost opportunity on future competitively bid construction projects as too speculative to be awarded in a §303 lawsuit. *Matson Plastering Company v. Plasterers Local 66*, 852 F.2d 1200, 1203 (9th Cir. 1988), *cert. denied*, 488 U.S. 998 (1988) (stating that the court has "never awarded damages for lost opportunities to bid on construction projects"); *Collier v. Hoisting Engineers Local 101*, 761 F.2d 600 (10th Cir. 1985) (there, the court rejected the employer's claim for lost future profits and found that the only damages established "were the loss of the job in progress"); *see, also, Morton*, 377 U.S. at 260 (damages recoverable under §303 "should be limited to actual, compensatory damages").

Here, the alleged lost future profit damages suffered by BE&K are even more speculative than those denied in *Matson* and *Collier*. Indeed, prior to BE&K incurring any work under the Starcon/BE&K agreement and, thus, earning any profits, the following sequence of events must occur. First, a project must exist which requires the type of construction work Starcon is capable of performing. Second, Starcon must timely submit a conforming competitive bid to be considered for that contract. Third, Starcon must prevail on its competitive bid over any and all other contractors which likewise submitted competitive bids for that project. Fourth, Starcon must determine that its existing labor force is inadequate to perform the work under the contract such that it needs manpower from another source. Fifth, Starcon must choose to obtain its manpower from BE&K as opposed to from another company which would provide it manpower. Sixth, Starcon's decision to utilize BE&K must *not* be violative of the NLRB order. Seventh, BE&K must have the manpower available to fulfill Starcon's needs if requested. Last, BE&K must decide to provide Starcon with the requested manpower. Absent one of these contingencies, BE&K does not obtain the work under its agreement with Starcon and, thus, has no opportunity to earn any profits. Accordingly, due to the unpredictability of

its claimed lost profits, this court should adopt the reasoning of the *Matson* and *Collier* courts and find BE&K's lost future profits claim too speculative and not permitted under §303.

Finally, BE&K failed to offer any reliable damages evidence but, rather, offered simply speculation. The only evidence of BE&K's alleged lost future profits was the baseless testimony of two unqualified lay witnesses, BE&K Tadlock and Starcon's Uremovich (Tr. 17, 61, 384, 432-36). Uremovich predicted Starcon would have given BE&K $12 million in business in 1996-2000 (Tr. 125-27). Tadlock predicted $11 million in gross revenues, including $1.4 million profit (Tr. 404-05). Those huge, unexplained numbers were **not** based on accounting records or business history, but solely "on [Tadlock's] experience as a business manager who makes the projections, who does estimating work, who keeps up with clients" (Tr. 405). Tadlock claimed those numbers were supported by calculations he had made before his deposition (Tr. 435). However, **he threw the calculations away** (*id.*) and made no attempt to reproduce them at trial.[9]

No evidence supports these made-up numbers. Tadlock testified BE&K invariably made a $4 profit on each hour of labor sold to Starcon (Tr. 388, 391), but offered no accounting records to support that claim.[10] Jerold Graff, a University of Chicago-trained C.P.A. with 39 years of accounting and auditing experience (Tr. 536-43), proved that claim to be inflated by a factor of 8.5.[11] Graff's erudite trial testimony and Rule

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[9] Remarkably, Tadlock also failed to reduce his predictions to present cash value (Tr. 435) as the law requires, *Monessen Southwestern Railway Co. v. Morgan*, 486 U.S. 330, 339 (1988), and the jury was instructed (Tr. 732-33). Tadlock admitted that he does not even understand the concept of discounting to present cash value (Tr. 436).

[10] The lower court refers to the alleged $4 per hour profit as being "actually a $4.00 contribution margin." *BE&K*, 156 F.3d at 770. The term "contribution margin" was never used by any party or witness in this case.

[11] Graff testified that Tadlock based his damages predictions on the assertion that BE&K made $4/hour profit (Tr. 555). That number is

26(a)(2) report (R.Doc. 225-2 at Defs. Ex. 1) are the **only** damages evidence in this case that met the exacting standards for evaluating lost future profit claims. *See, e.g., Mid-America*, 100 F.3d at 1367-69; *Zazu Designs*, 979 F.2d at 505-06. BE&K failed to rebut Graff's testimony and report – offering no basis in accounting, economics or mathematics for questioning his analysis or his shredding of the $4/hour profit contention, the linchpin of BE&K's damages claim.

Likewise, BE&K introduced no accounting records to support Tadlock's claim that it invariably made $4/hour profit, Tr. 388, 391, nor any evidence of how many man-hours of work it would have done for Starcon. BE&K's numbers, like the ones in *Zazu*, are naked speculation unsupported by business history or accounting records. BE&K's speculation is indeed even more blatant, because unlike the evidence in *Zazu* it **had** a "track record." BE&K's failure to cite that track record strongly suggests that it does not support its claims. BE&K should not be permitted to do an end-run around *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579

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erroneous in three ways. First, BE&K documents and Tadlock's deposition testimony show that $1.60 of the $4.00 is overhead, leaving only $2.40/hour as alleged profit (Tr. 556-57, 560-66; R.Doc. 270 at Def. Ex. 1 at Opinion No. 1, pp. 2-5; R.Doc. 225-2 at Plf. Ex. 2 at BEK00205; *see also* Tr. 523-24, 533-34). Second, Tadlock bases the $4/hour number on a workers' compensation rate of $15.25 per $100 of wages, but BE&K documents prove it pays $26.98 per $100 (Tr. 551-53, 566-71, 598-600, 662-66; R.Doc. 270 at Def. Exs. 6-7, 12-14). Using the correct figures further reduces BE&K's alleged profit to $.52 per hour (Tr. 566-71). Third, Tadlock's figures calculate a profit percentage based solely on straight-time hours, but 3/7 of the hours worked on turnarounds are overtime hours, on which BE&K makes no additional profit (Tr. 571-73, 600-03). The per-hour profit is thus a smaller proportion of total revenues than Tadlock assumes (*id.*). These corrections reduce BE&K's alleged profit to 1.5% of gross revenues before discounting (Tr. 604).

Tadlock testified that BE&K would have made $1.4 million profit on gross revenues of nearly $11 million from Starcon (Tr. 404-05, 432). That is a 12.7% profit margin, approximately 8½ times the 1.5% margin to which Graff testified and **BE&K never responded.**

(1993) and Fed. R. Civ. P. 26(a)(2) by simply presenting baseless testimony of unqualified lay witnesses. *See, Asplundh Manufacturing Division v. Benton Harbor Engineering*, 57 F.3d 1190 (3d Cir. 1995).

Similarly, BE&K offered no evidence to justify the explosive growth in the amount of work it predicted with Starcon that would be required to support Tadlock's testimony of $1.4 million in damages, or the $544,000 verdict. The only evidence of even **projected** profits on any of BE&K's four jobs with Starcon was Tadlock's testimony that BE&K would have made a $29,960 profit had it completed the 1995 UNO-VEN job (Tr. 408; R.Doc. 225-2 at Plf. Ex. 30).

This paltry evidence did not support Tadlock's fantasy of $1.4 million in lost profits in 1996-2000. That averages $280,000 a year in profits, **over nine times that claimed for the UNO-VEN job** – BE&K's **only** job with Starcon in 1995. "The evidence fails to support such an assumption. Indeed, it decidedly speaks against it." *In re Innovative Construction Systems, Inc.*, 793 F.2d 875, 889 (7th Cir. 1986). Projections must be based on relevant data, not wildly optimistic predictions unrelated to business history. *Mid-America*, 100 F.3d at 1367-69; *Zazu Designs*, 979 F.2d at 506; *Olympia*, 797 F.2d at 382-83. This Court should reject the astronomical **800% growth** in BE&K profits from its relationship with Starcon between 1995 and 1996 that Tadlock predicted as a disguised request for punitive damages contrary to the Court's holding in *Morton*.

In sum, BE&K's lost future profits claim rests solely on wildly speculative, unqualified lay testimony; is supported by no accounting evidence or business records, Fed. R. Evid. 803(6); and is not based on historical data. Such rank speculation will not support a jury verdict. *Mid-America*, 100 F.3d at 1367-69; *Zazu Designs*, 979 F.2d at 506.

CONCLUSION

For all of the above-stated reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

BE&K CONSTRUCTION COMPANY,

Plaintiff-Appellee,

v.

WILL & GRUNDY COUNTIES BUILDING TRADES COUNCIL, AFL-CIO, and Local 150 International Union of Operating Engineers, AFL-CIO, Defendants-Appellants.

Nos. 97-2720, 97-2732.

United States Court of Appeals,
Seventh Circuit.
Argued Feb. 19, 1998.
Decided Sept. 18, 1998.
As Amended on Denial of Rehearing and Suggestion for Rehearing En Banc Nov. 23, 1998.

Arthur M. Scheller, III, Gardner, Carton & Douglas, Chicago, IL, E. Mabry Rogers (argued), Bradley, Arant, Rose & White, Birmingham, AL, for Plaintiff-Appellee.

Dale D. Pierson (argued), Baum, Sigman, Auerbach, Pierson & Neuman, Peter M. Katsaros, Gessler, Hughes & Socol, Chicago, IL, for Defendant-Appellant Local 150 International Union of Operating Engineers, AFL-CIO.

Roger N. Gold (argued), Gold & Polansky, Chicago, IL, for Defendant-Appellant Will & Grundy Counties Building Trades Council, AFL-CIO.

Before COFFEY, MANION, and DIANE P. WOOD, Circuit Judges.

MANION, Circuit Judge.

BE&K Construction Company sued Will & Grundy Counties Building Trades Council ("Trades Council")

AFL-CIO, and International Union of Operating Engineers Local 150 ("Local 150") under Section 303 of the Labor Management Relations Act, 29 U.S.C. § 187 ("LMRA"), alleging that the defendants illegally threatened a secondary picket and that these threats caused BE&K to lose construction jobs. A jury returned a verdict in favor of BE&K, awarding it $544,000. The defendants appeal arguing that (1) evidentiary and instruction errors resulted in an unfair trial; (2) the evidence is insufficient to support the jury's verdict and damage award; and (3) BE&K's claim against Local 150 is barred by the statute of limitations. We affirm.

I. Factual Background[1]

BE&K, a Birmingham, Alabama, non-unionized company, provides various construction-related services throughout the United States. On June 11, 1994, BE&K entered into a "Master Contract" with Starcon, Inc., a mechanical contractor based in Manhattan, Illinois. Starcon provides maintenance and repair services to the oil and petrochemical industry. In the Master Contract, BE&K agreed to provide boiler repair and retrofit services to Starcon on an as-needed basis; the Master Contract also set forth the terms under which BE&K would provide these services, including the hourly rates and the types of reimbursable costs.

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[1] Because we are reviewing a jury verdict, we view the evidence and all reasonable inferences in the light most favorable to the winning party (here BE&K). The following rendition of the facts are set out accordingly.

Between June 11, 1994 (the date of the Master Contract) and September 1995, Starcon hired BE&K to perform services on three jobs: at a UNO-VEN refinery in Lemont, Illinois; at Mobil Oil in Joliet, Illinois; and at Marathon Oil in Robinson, Illinois. Then on September 12, 1995, Starcon hired BE&K for a fourth time: Under this contract BE&K agreed to provide services for Starcon's turnaround project at UNO-VEN in Lemont, Illinois. This turnaround project (valued at between $5,000,000 and $7,000,000) involved the temporary shutdown of a portion of UNO-VEN's refinery so that Starcon could perform preventative maintenance and repair work. It was scheduled to take three weeks.

On September 18, 1995, approximately thirty BE&K employees reported to work at UNO-VEN. Around the same time, Michael Quigley, a Local 150 member and president of the Trades Council since 1990, and Gary Benefield, a Local 150 member and delegate to the Trades Council, learned that Starcon had hired BE&K (which they knew was a non-unionized company) to perform work during the UNO-VEN turnaround. After learning of BE&K's involvement, Quigley and Benefield contacted UNO-VEN and met with UNO-VEN managers Stan Taylor and Art Klien in UNO-VEN's cafeteria. During this meeting, Quigley told UNO-VEN manager Taylor that BE&K had "to be gone . . . that threat cannot be there" and that UNO-VEN could "expect a lot more serious problems than they've had in the past" if they did not remove BE&K, and that UNO-VEN could take these statements "any way they want." Taylor asked Benefield several times if he was going to picket if BE&K stayed, to which Benefield repeatedly responded, "it's always a

possibility." In fact, in an earlier telephone conversation, Quigley had told Taylor that the pickets would be "at UNO-VEN."

At trial, BE&K offered evidence explaining the "serious problems they've had in the past": Just four months earlier, UNO-VEN and various Trades Council members, including Local 150, were involved in a dispute over UNO-VEN's use of Four Seasons Environmental, a non-union contractor, and both Quigley and Benefield participated in the Four Seasons picketing. During that dispute, Local 150 set up pickets which shut down a substantial portion of the refinery for several days. Even though UNO-VEN had established a separate gate for Four Seasons, the picketing was not restricted to that area. As a result of the picketing and the three days of down-time, UNO-VEN removed Four Seasons and the work went to Local 150 workers.

Following the meeting at UNO-VEN's cafeteria, several members of UNO-VEN's management held internal meetings to discuss the unions' threats. Starcon's founder and president Michael Uremovich also met with the UNO-VEN manager in charge of the turnaround, Richard Albaugh. Uremovich suggested that UNO-VEN establish a separate gate for Starcon's use, but Albaugh rejected that proposal because it had not worked during the Four Seasons incident and he was concerned that it also would not work with Starcon. Uremovich asked for time to work something out (short of removing BE&K) and Albaugh agreed. During a second meeting, Albaugh told Uremovich that UNO-VEN could not afford to have another Four Seasons incident and that it could not fight that

fight. Uremovich again asked for time to talk to Quigley to determine the seriousness of the situation.

Following this second meeting with Albaugh, Uremovich contacted Quigley and asked to meet to discuss the problem at UNO-VEN. Quigley agreed. The two later met at a local Bob Evans Restaurant. Concerned that Quigley would make unlawful threats and that he would later be unable to prove that the threats were made, Uremovich secretly taped the meeting. Speaking of Starcon, Quigley told Uremovich that "it's no secret that we're coming after you . . . and not just on one front." Regarding BE&K, Quigley told Uremovich:

> The position is that we're going to treat them as our worst enemy and we, we'll take any and all, all remedies including picketing. Mike, I don't have a choice in this. This is, this is, this is, this is something that we cannot deal with, and we don't intend to deal with. If this is, this now sends off international signals all over the place that they're coming into a market that, that, that never had before, and if, their intention is to secure a place in that market, that's a threat on every single trade that we've got, and we're not going to tolerate it.

Quigley also told Uremovich that Starcon's relationship with BE&K "really turns the heat up on you too." Uremovich asked Quigley if there would be pickets if BE&K were taken off the job and Quigley responded, "not at you." Quigley also stated that if BE&K were not removed "there would be picket lines and there would be trouble like we've never seen before."

Following the lunch meeting, Uremovich informed UNO-VEN that Quigley was serious about his threats to UNO-VEN and that he had also threatened Starcon. Based on these facts, Albaugh determined that the turn-around project "could be put in jeopardy if BE&K was to continue to do the work that they were working on." According to Albaugh, the Four Seasons incident "was fresh in our mind and we were concerned that something like that could happen again . . . we were at a very vulnerable time with our units being out of production." UNO-VEN instructed Starcon to remove BE&K from the job site, which it did.

After being removed from the UNO-VEN job, BE&K sued the Trades Council. BE&K later filed an amended complaint naming additional defendants, including Local 150.[2] BE&K alleged claims under section 303 of the LMRA, as well as state common law claims, although the district court granted the defendants summary judgment on all of the claims except the section 303 claim, which was tried to a jury.

At trial, BE&K argued that the Trades Council and Local 150 violated section 303 by illegally threatening UNO-VEN and Starcon with secondary pickets unless they removed BE&K from the Starcon job, while the Trades Council and Local 150 asserted that all they did was inform UNO-VEN and Starcon that the unions might picket BE&K, the primary employer. The jury believed

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[2] Other unions were also named, but the district court dismissed the claims asserted against those unions and this is not challenged on appeal.

BE&K and awarded it $544,000 in damages. The defendants' motions for judgment as a matter of law, a remittitur, or new trial were denied. For the reasons that follow, we affirm.

II. Analysis

On appeal, Local 150 argues that BE&K's section 303 claim against it is barred by the statute of limitations. If not time-barred, Local 150, along with the Trades Council, claims that various evidentiary and jury instruction errors mandate reversal and a new trial. They also argue that insufficient evidence exists to support the jury's conclusion that the threats were threats of illegal secondary pickets, as opposed to threats of legal primary pickets. Local 150 also asserts that the evidence is insufficient to support a finding that it (as opposed to the Trades Council) made the threats. Finally, Local 150 and the Trades Council claim that the damage award cannot stand.

Before considering the specifics of this appeal, a brief summary of the law is necessary to put the issues in perspective. Section 303 of the LMRA provides a cause of action for parties injured by a labor organization engaged in "any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title." 29 U.S.C. § 187. In turn, section 158(b)(4) provides:

> It shall be an unfair labor practice for a labor organization or its agents – . . . .
>
> > (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . .

> (B) forcing or requiring any person . . . to cease doing business with any other person . . . Provided, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or picketing activity.

29 U.S.C. § 158(b)(4).

Section 158(b)(4) preserves the right of labor organizations to pressure employers with whom they have a primary dispute, while shielding third parties, also called "secondary employers," not directly involved in the labor dispute. *Helgesen v. International Assoc. of Bridge, Structural & Ornamental Ironworkers, Local Union 498*, 548 F.2d 175, 180 (7th Cir.1977).

> The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands. Where a union has a grievance with the terms and conditions of employment of a certain employer (the "primary" employer), it must focus its picketing activity on that employer. The union may not exert pressure on an unrelated, "secondary" employer in order to coerce the secondary employer to cease dealing with the primary employer, thereby advancing the union's goals indirectly. If the union acts with "mixed motives," partially primary and partially secondary, its conduct is unlawful under section 8(b)(4); it is not necessary to find that the sole object of the strike was secondary so long as one of the union's objectives was to influence

> the secondary employer to bring pressure to bear on the primary.

Mautz & Oren, Inc. v. Teamsters, Chauffeurs, and Helpers Union, Local No. 279, 882 F.2d 1117, 1120-21 (7th Cir.1989) (internal citations omitted).

While this is a rather straightforward summary of the law, the application is not so clear, especially when the primary and secondary employers share a common work site as they do in this case. In such a situation, courts apply the so-called Moore Dry Dock standards (named after the NLRB case in which they originated, *see Sailors' Union of the Pacific (Moore Dry Dock)*, 92 N.L.R.B. 547, 549 (1950)).

> Under these standards, a union's picketing is presumed to be lawful primary activity if (1) it is "strictly limited to times when the situs of the dispute is located on the secondary employer's premises"; (2) "the primary employer is engaged in its normal business at the situs"; (3) it is "limited to places reasonably close to the location of the situs"; and (4) it "discloses clearly that the dispute is with the primary employer."

International Union of Operating Engineers, Local 150 v. N.L.R.B., 47 F.3d 218, 223 (7th Cir.1995) (quoting *Mautz*, 882 F.2d at 1122).

Because this case involves threats as opposed to actual pickets, the question properly before the jury was whether the unions threatened illegal secondary pickets under these standards. And the question before us is whether sufficient evidence supports the jury's verdict that the unions made threats of such illegal secondary

pickets. We will turn to this in due course, but first consider the initial question regarding the statute of limitations.

A. Statute of Limitations

Whether or not it threatened UNO-VEN and Starcon with illegal secondary pickets, Local 150 contends that it is entitled to judgment based on the statute of limitations. Section 303 of the LMRA does not provide a limitations period. However, it does provide that suits under this section are "subject to the limitations and provisions of section 301 of this title." 29 U.S.C. § 187. Section 301 also does not contain a limitations period, but in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 172, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), the Supreme Court held that the six-month limitations period for filing charges of unfair labor practices with the National Labor Relations Board ("NLRB") applied to a suit brought under section 301 of the LMRA. Local 150 argues that because *DelCostello* concluded that the six-month NLRA limitations period applies to a section 301 claim and because section 303 adopts section 301's limitations period, the NLRA six-month limitations period applies in this case. And since BE&K was removed from the UNO-VEN job on September 25, 1995 and did not amend its complaint to add Local 150 until June 1996, Local 150 argues that the suit against it is time-barred.

On the surface this argument seems logical enough. Yet when considered in light of the Supreme Court's rationale in *DelCostello* it cannot stand (which is why

every other circuit court to have considered this argument has rejected it). *Prater v. United Mine Workers of America, Districts 20 and 23*, 793 F.2d 1201, 1209-10 (11th Cir.1986); *Carruthers Ready-Mix Inc. v. Cement Masons Local Union No. 520*, 779 F.2d 320, 327 (6th Cir.1985); *Monarch Long Beach Corp. v. Soft Drink Workers, Local 812 Internat'l Brotherhood of Teamsters*, 762 F.2d 228, 231 (2d Cir.1985). As these circuits did, we begin by considering *DelCostello*.

In *DelCostello*, the plaintiff sued both his employer and his union under section 301 of the LMRA, alleging that the employer violated the collective bargaining agreement by firing him, and that his union violated its duty of fair representation in representing him in the grievance procedure. Both the district court and the court of appeals applied the state's three-year statute of limitations for actions on contracts. The Supreme Court reversed, reasoning that notwithstanding the general rule that when federal law is silent on the limitations period state law governs, "[i]n some circumstances . . . state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law. In those instances, it may be inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law." *DelCostello*, 462 U.S. at 161, 103 S.Ct. 2281. The Court reasoned that with a case such as the one at issue – a hybrid section 301/duty of fair representation suit – the state's limitations period conflicted with the federal labor law interest in facilitating the rapid final resolution of labor disputes. The Court then held that the more appropriate statute of limitations was the six-month limitations period for filing charges of unfair labor practices with the NLRB.

However, in doing so the Court

> stress[ed] that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere. We do not mean to suggest that the federal courts should eschew use of state limitations periods any time state law fails to provide a perfect analogy.

Id. at 171, 103 S.Ct. 2281.

Following *DelCostello*, three circuits have applied its holding in circumstances identical to those involved here, namely a section 303 unfair labor practices suit alleging an illegal secondary picket. *Monarch*, 762 F.2d at 231; *Prater*, 793 F.2d at 1209-10; *Carruthers*, 779 F.2d at 326. We find this authority persuasive and today join these circuits and hold that the NLRA six-month limitations period does not apply to section 303 unfair labor practices claims.[3]

As these circuits recognize, the policy interests justifying a six-month limitations period for a hybrid section 301/fair representation claim do not exist when the suit involves a section 303 unfair labor practices claim. "A uniform six-month statute of limitations is suitable for

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[3] A footnote in *Landgrebe Motor Transport, Inc. v. District 72*, 763 F.2d 241, 244 n. 1 (7th Cir.1985), noted the possibility that *DelCostello* required the use of the NLRA's six-month limitations period in section 303 suits. However, the court stated that neither party "even remotely suggested that the statute of limitations issue" was important in that case; thus the court refrained from considering whether or not the six-month limitations period applied.

hybrid § 301 suits to facilitate and protect 'those consensual processes that federal labor law is chiefly designed to promote – the formation of the collective bargaining agreement and the private settlement of disputes under it.' " *Prater*, 793 F.2d at 1209 (quoting *DelCostello*, 462 U.S. at 163, 103 S.Ct. 2281). But with "a secondary boycott, the section 303 cause of action involves parties who are otherwise completely unrelated. . . . [I]t does not arise within the context of a labor-management relationship. Labor peace will not be disrupted if section 303 suits are not rapidly resolved." *Monarch*, 762 F.2d at 231. *See also, Carruthers*, 779 F.2d at 326 ("Rapid resolution of labor disputes is especially favored when parties to the collective bargaining agreement are involved and breakdown of the collective bargaining process is threatened. No such threat exists in this case as no labor relationship exists between the parties to this action."). Given the different policy interests, and the Supreme Court's mandate in *DelCostello* that its holding "should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere," 462 U.S. at 161, 103 S.Ct. 2281, we conclude that the statute of limitations for a section 303 claim should be the most closely analogous state limitations period. The district court concluded that Illinois' five-year statute of limitations for tort actions provides the closest analogy. Because the unions do not dispute that this is the best state law analogy, we also will apply this limitations period, and doing so means that BE&K's suit (brought within one year of its termination) against Local 150 is timely.

We also note that the Supreme Court has refused to extend the six-month limitations period of *DelCostello* to other straightforward section 301 claims (as opposed to a hybrid 301/fair representation claim) because of the differing policy concerns. *Reed v. United Transportation Union*, 488 U.S. 319, 109 S.Ct. 621, 102 L.Ed.2d 665 (1989). In *Reed*, the Supreme Court concluded that *DelCostello* did not govern because a section 301 claim – as opposed to a hybrid claim – does not "challeng[e] the 'stable relationship' between the employer and the union. It does not affect any interpretation or effect any reinterpretation of the collective bargaining agreement and so, unlike the hybrid actions, . . . does not attack a compromise between labor and management. . . . There is no erosion of the finality of private settlements. . . . " *Id.* at 331, 109 S.Ct. 621 (quoting *Doty v. Sewall*, 784 F.2d 1, 7 (1st Cir.1986)). The Supreme Court's refusal to apply the six-month limitations period to all section 301 claims further supports our conclusion that it should not apply to a section 303 claim.

B. Evidentiary Issues

Local 150 (joined by the Trades Council) also challenges numerous evidentiary rulings, which we review for an abuse of discretion. *Old Republic Ins. Co. v. Employers Reinsurance Corp.*, 144 F.3d 1077, 1082 (7th Cir.1998). The appellants claim that the district court abused its discretion in refusing to introduce a videotape about BE&K which Quigley delivered to the UNO-VEN managers after the meeting in UNO-VEN's cafeteria. They argued that this evidence was necessary to put Quigley's statements in context; to demonstrate that their

actions were directed only against BE&K; to show that they intended only to undertake lawful activities; and to contradict BE&K's testimony that it was voted "one of the 100 best employers in America." The district court excluded the tape, concluding that any probative value of the videotape was substantially outweighed by unfair prejudice. Fed.R.Evid. 403. The district court did not abuse its discretion in reaching this conclusion. The slight probative value it offered was outweighed by the unfair prejudice resulting from a tape – found by the district court to be union propaganda – which included such highly prejudicial statements as "BE&K is a parasite on the life of the community."

The unions claim next that the district court erred in permitting BE&K to present evidence concerning the Four Seasons dispute. BE&K proffered evidence of the Four Seasons labor dispute to explain what the unions meant when they warned UNO-VEN that it could "expect a lot more serious problems than they've had in the past." The unions, in effect, argue that in making this statement they did not mean the Four Seasons dispute and that because they never referred to that dispute by name, any evidence concerning it was irrelevant. However, just because the unions say they did not mean the Four Seasons dispute does not mean that the court had to take their word. Nor does it matter that the unions did not name the past problems as those involved in the Four Seasons dispute. Rather, this is a classic jury question – it was for the jury to decide what the unions meant by "past" problems.

The unions argue alternatively that any probative value of the Four Seasons picket was substantially outweighed by unfair prejudice. Fed.R.Evid. 403. Specifically, they take issue with testimony referencing violence and vandalism in relation to the Four Seasons dispute, and testimony that BE&K believed that the unions had acted illegally in the Four Seasons matter, and finally that no evidence linked the Trades Council to the Four Seasons incident. On the other hand, evidence concerning the Four Seasons dispute was highly probative of the question of whether the unions threatened UNO-VEN with unfair labor practices. *BE&K Construction v. United Broth. of Carpenters*, 90 F.3d 1318, 1331 (8th Cir.1996) ("To determine whether particular statements constitute a prohibited threat, the specific language and the surrounding facts and circumstances are examined. . . . "). The district court considered both the prejudice and the probative value, and concluded that the latter outweighed the former. The district court did not abuse its discretion in making this assessment.

The last evidentiary challenge concerns the district court's refusal to admit Defendant Exhibit 26, which was the Decision of Administrative Law Judge Robert T. Wallace of the National Labor Relations Board in an NLRB case brought by the International Brotherhood of Boilermakers against Starcon, alleging that Starcon violated the National Labor Relations Act by refusing to hire or consider for employment union members. The defendants sought to admit the ALJ decision to put the unions' statements in context, to impeach Uremovich's testimony at trial, and specifically to counter Uremovich's testimony that Starcon intended to hire BE&K in the future. The

district court refused to admit the ALJ decision, concluding that it would confuse the jury, improperly inject numerous collateral issues into trial, and that any probative value of the ALJ decision was outweighed by undue prejudice.

The appellants first contend that the ALJ decision was necessary to put in context statements made during the meeting at Bob Evans. They argue that "[t]he *Starcon* decision would have allowed the jury to understand the conversation as relating to that existing and continuing dispute, and explained the precise nature of the relationship between Starcon and BE&K." However, the trial transcript demonstrates that the unions were allowed to question Uremovich regarding the conversation at Bob Evans and were able to present their version of the exchange. Similarly, the trial transcript shows that the unions extensively questioned Uremovich about his alleged union bias and specifically concerning the labor dispute between Starcon and the unions. Because the unions were able to question Uremovich on these points, the exclusion of the ALJ decision did not affect appellants' substantial rights and therefore did not constitute an abuse of discretion. *Ross v. Black & Decker, Inc.*, 977 F.2d 1178, 1183 (7th Cir.1992) (a trial court's evidentiary ruling will be disturbed only if the substantial rights of the appellant were affected).

The defendants also sought to admit the ALJ decision to counter BE&K's damage theory: BE&K claimed that Starcon intended to use it for later turnaround jobs, but because of the defendants' illegal threats, Starcon refused to subcontract with BE&K. The defendants argue that the ALJ decision refuted this theory because in that decision

the ALJ ordered Starcon to cease and desist from "subcontracting work to BE&K, or any other contractor, to avoid hiring union members or organizers." Further, the ALJ ordered Starcon to "offer immediate employment" to approximately 120 union activists who were illegally denied employment. The ALJ decision also concluded that "but for its refusal to hire applicants who are union activists, Starcon would have had no need to use BE&K employees."

The district court excluded this evidence concluding that any probative value was outweighed by unfair prejudice:

> The findings of the ALJ are the product of an administrative proceeding that did not involve the parties that are involved in this lawsuit. So it is entirely collateral to begin with, which is quite unlike the cases, the Title VII cases that the defendants submitted. All three of those cases, some quite old cases and of questionable applicability today, involve employment situations where there have been prior administrative action involving the plaintiff in the same case – same plaintiff, not same case but same plaintiff. That certainly is not the case here. So I cannot find those cases analogous. But to apply traditional principles under rule 403 of the Federal Rules of Evidence, I find that any slight probative value that Defendants' Exhibit 26 might have as to the credibility of a Starcon witness, is substantially outweighed by the danger of unfair prejudice as to BE&K. I think it would raise collateral issues, including Starcon's objections, which are numerous, to the ALJ's report, which is not the final determination by the NLRB; by the danger of jury confusion as to the

> issues in the NLRB proceedings against Starcon; and the applicability to this case; and would actually result in a trial within a trial on these collateral issues. So for those reasons, the objection to Defendants' Exhibit 26 is sustained.

"[A] reviewing court gives special deference to the evidentiary rulings of the trial court," *Ross*, 977 F.2d at 1183, and given this deference, the district court did not abuse its discretion in excluding the ALJ decision. While relevant to the amount of damages, the ALJ decision did not prohibit Starcon from using BE&K in the future; rather the decision ordered Starcon not to use subcontractors to avoid hiring union employees. To admit the ALJ decision would inject an entirely collateral matter into trial. Moreover, the three relevant findings to which the unions point are part of a 15-page single-spaced decision which included numerous findings that Starcon violated federal labor law in an unrelated lawsuit. The district court concluded that these findings would confuse the jury and unfairly prejudice BE&K, which was not a party to the *Starcon* dispute. The district court did not act unreasonably in so concluding. Additionally, at the time of trial the ALJ decision was not a final decision. This placed the district court in a difficult position: If the ALJ decision were admitted and not adopted by the NLRB, the plaintiffs would complain; if excluded and affirmed, the defendants would object. Faced with this uncertainty, the district court considered the impact of the decision, including the fact that it did not prohibit Starcon from hiring BE&K, but merely prohibited Starcon from refusing to hire union employees because of their union membership. In addition, it considered the unfair prejudice

likely caused BE&K due to the negative findings regarding Starcon with whom BE&K was associated. Given all of this, the court reasonably concluded that the evidence should be excluded. With the numerous irrelevant and prejudicial findings of fact included in the 15 page decision, the district court acted rationally in excluding the decision. *Wheeler v. Sims*, 951 F.2d 796, 802 (7th Cir.1992) ("[T]he abuse of discretion standard is met only when the trial judge's 'decision is based on an erroneous conclusion of law or where the record contains no evidence on which [s]he rationally could have based that decision, or where the supposed facts found are clearly erroneous.' ").

C. Instructions

The appellants next challenge the jury instructions. They contend that the district court erred in giving some instructions and in refusing others. "When reviewing the adequacy of jury instructions, we construe them in their entirety and not in artificial isolation, to determine if the instructions as a whole were sufficient to inform the jury correctly of the applicable law." *Trytko v. Hubbell, Inc.*, 28 F.3d 715, 725 (7th Cir.1994) (internal quotations omitted).

At trial the defendants proposed two specific instructions addressing their theory of defense, namely that they merely attempted to legally persuade a secondary employer to cease doing business with the primary employer; they did not threaten a secondary picket, they merely informed the secondary employers that they may picket the primary employer BE&K. Defendants' Proposed Jury Instruction 3 stated:

> A labor organization does not violate Federal Law by making an appeal to a neutral employer asking it to cease doing business with a primary employer so long as such appeal is not accompanied by unlawful threats or coercion. A labor organization may lawfully threaten or warn a neutral employer that it intends to picket a primary employer.

Very similar was the Modified Proposed Jury Instruction 4:

> A labor organization may lawfully threaten or warn a neutral employer that it intends to picket a primary employer. A labor organization's threat to engage in a lawful activity is itself protected by the law.

The district court declined to give both proposed instructions. While these instructions properly state the law, that is not the only inquiry. Rather, we must determine whether "the instructions as a whole were sufficient to inform the jury correctly of the applicable law and theory of defense." *United States v. Villarreal*, 977 F.2d 1077, 1079 (7th Cir.1992). This requires us to look not just at the excluded instructions to see if they properly state the law, but at the included instructions to see if they sufficiently state the law. If so, and if the jury was not likely confused or misled, then we will not reverse simply because the district court failed to tender an additional correct instruction.

We have reviewed the jury instructions and conclude that as a whole they adequately informed the jury of the law and the unions' theory of defense. Specifically, the jury instructions provided:

> When a labor organization has a dispute with an employer regarding that employer's labor and employment policies, the dispute is called a primary dispute and the employer is called a primary employer. Federal law protects the right of a labor organization to lawfully picket, or take other lawful action, against an employer with whom it has a primary dispute concerning that employer's labor and employment policies. The action taken by the union is referred to as primary activity.

The jury was also instructed on "Secondary Conduct":

> The Federal law prohibits a union from unlawfully threatening or coercing an employer with whom it does not have a dispute in order to force that employer to cease doing business with a primary employer. The employer with whom the union does not have a dispute is referred to as a neutral or secondary employer. The union's activity against this neutral or secondary employer is called secondary activity. Federal law allows any person injured by a union's unlawful secondary activity to bring a lawsuit to recover the damages which he sustained. Conduct engaged in by a union which has both a legal objective and an illegal secondary objective is violative of Federal labor law.

The jury instructions further informed the jury that:

> A union is prohibited from making unlawful threats or engaging in coercive conduct where the object or purpose is to enmesh a neutral or secondary employer in the union's dispute with the primary employer. However, union conduct that has substantial and foreseeable effects on

> the neutral or secondary employer does not violate the law unless the employer establishes that the union intended to cause a disruption of the neutral employer's business.

These instructions properly informed the jury regarding the law of unfair labor practices and more specifically the difference between legal primary pickets and illegal secondary pickets. The defendants claim that is not enough, arguing: "None of the instructions provided the jury with the two basic § 8(b)(4) principles which it needed to evaluate Defendant's defense: (1) it is not a violation of § 8(b)(4) to attempt to persuade a secondary employer to cease doing business with the primary employer; and (2) it is not a violation of § 8(b)(4)(ii)(B) for a union to threaten or warn a secondary employer that a primary will be picketed." In effect, the defendants argue that the court improperly instructed the jury because it told the jury what *constitutes* an unfair labor practice as opposed to what is *not* an unfair labor practice. While a court must inform the jury of a defendant's theory of defense, it does not have to do so by using the exact formulation the defendant proposed. Rather, "[w]e give deference to the district court's discretion in determining the specific wording of the instruction," and "[s]ince the composition of jury instructions is not an exact science, many formulations may be adequate." *United States v. Smith*, 131 F.3d 685, 688 (7th Cir.1997).

The appellants also argue that the district court erred in giving the following jury instruction:

> If a union or other labor organization acts with mixed motives, meaning that it intended to

> affect both the primary employer and the secondary employer, its conduct is unlawful. In other words, it is not necessary to find that a union acted with the sole object or intention to affect the secondary employer. So long as one of the union's objectives was to influence the secondary employer in order to bring pressure to bear on the primary employer, its conduct is unlawful.

The appellants contend that this instruction is misleading because it creates the impression that the union has engaged in unlawful conduct merely because it has the objective to influence the secondary employer to bring pressure on the primary employer, whether or not the union also engaged in coercive conduct. The appellants' reading of this instruction, however, takes it out of context. The instruction began by focusing the jury on the issue of intent in a mixed-motive case. It then explained in simpler terms the significance of a mixed motive. While motive alone is not enough, this instruction followed multiple instructions explaining that the jury must find that the defendants both engaged in illegal coercive conduct, and intended to influence the secondary employers. Therefore, even though this instruction, standing alone, could be confusing, given the extensive and clear instructions provided on primary and secondary activity (set forth above), the instructions as a whole adequately informed the jury of the law. *See Stachniak v. Hayes*, 989 F.2d 914, 920 (7th Cir.1993) (instructions should be construed "in their entirety" and not "in artificial isolation."); *United States v. Dack*, 987 F.2d 1282, 1284 (7th Cir.1993) ("[W]e must construe the instructions in

their entirety, not in isolation, and look for overall fairness and accuracy.").[4]

Finally, the unions argue that the district court erred in refusing their Proposed Jury Instruction 1:

> When a primary employer and another employer are so closely related in their business activity they are both considered to be primary employers. There can be more than one primary employer involved in a labor dispute.

The defendants sought this instruction to support their theory that both Starcon and BE&K were primary employers.

The district court did not err in refusing this instruction. First, it does not adequately explain the law. The instruction presents the question as merely whether the employers are "closely related in their business activity" without explaining what that means. Not only is this ambiguous and likely to confuse the jury, it is also not the test for determining whether two entities both should be considered primary employers. The court case the unions cite in support of their position, *John B. Cruz Const. Co.*,

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[4] The appellants also argue that the district court erred in refusing to give proposed jury instructions 5, 7, and 9, which they assert would have explained important nuances in the law. We have reviewed these instructions and conclude that they add nothing of importance to the instructions provided and, as the district court found, were argumentative. Therefore, the district court properly rejected these instructions. *Spesco, Inc. v. General Elec. Co.*, 719 F.2d 233, 239 (7th Cir.1983) ("An instruction is viewed as argumentative if it emphasizes the testimony of one witness while disregarding other relevant evidence. The district court, in its discretion, may reject argumentative instructions.").

Inc. v. United Broth. of Carpenters & Joiners of America, Local 33, 907 F.2d 1228, 1231 (1st Cir.1990), is inapposite. This case held that "[t]he test to determine whether corporate divisions are the same person under the Act is whether there is actual or active common control sufficient to denote an appreciable integration of operations and management policies." Not only did this decision not adopt a "closely related in their business activity" test, but it also involved divisions of the same corporation, rather than entirely unrelated business entities. The appellants utterly fail to point to any case law supporting their "closely related in their business activity" formulation, nor can we find any in this context. In fact, the only reference to this standard appears in cases concerning pleading amendments. *See, e.g., In re Allbrand Appliance & Television Co., Inc.*, 875 F.2d 1021, 1025 (2d Cir.1989) ("Under that exception, the institution of an action against one party will constitute imputed notice to a party subsequently named by an amendment of the pleading when the parties are closely related in their business activities or linked in their corporate structure."). Beyond the fact that the instruction failed to properly explain the law, the evidence does not support a finding that both BE&K and Starcon should be treated as primary employers under the law. Therefore, the district court did not err in refusing this instruction. *Beard v. Mitchell*, 604 F.2d 485, 497 (7th Cir.1979) ("[P]laintiff has no right to the presentation of an instruction unsupported by the evidence adduced at trial.").

D. Sufficiency of the Evidence

The appellants next argue that the evidence was insufficient to support the jury's finding that they threatened UNO-VEN and Starcon with unfair labor practices. The unions contend that "union representatives did no more than seek to persuade UNO-VEN officials to cease using BE&K and stated that pickets might be established *against BE&K* if BE&K remained on the job site." Because the activity as the unions now describe it is entirely legal, *see Mautz*, 882 F.2d at 1121; *International Union of Operating Engineers Local 150 v. N.L.R.B.*, 47 F.3d 218, 223 (7th Cir.1995), the unions assert that the jury verdict cannot stand, and that the district court should have granted their motion for judgment as a matter of law.

We review the denial of a motion for judgment as a matter of law *de novo*. *McNabola v. CTA*, 10 F.3d 501, 515 (7th Cir.1993). We limit our inquiry to "whether the evidence presented, combined with all reasonable inferences permissibly drawn therefrom, is sufficient to support the verdict when viewed in the light most favorable to the party against whom the motion is directed." *Tapia v. City of Greenwood*, 965 F.2d 336, 338 (7th Cir.1992). "In other words, we are limited to assessing whether no rational jury could have found for the plaintiff." *Tincher v. Wal-Mart Stores, Inc.*, 118 F.3d 1125, 1129 (7th Cir.1997) (internal citations omitted).

Viewing the evidence in this light, the jury did not act unreasonably in finding that the unions had threatened Starcon and UNO-VEN with illegal secondary pickets. The jury heard evidence that Trades Council president Michael Quigley had told UNO-VEN managers

that if BE&K were not removed from the UNO-VEN project, UNO-VEN could "expect a lot more serious problems than they've had in the past." (Those past problems included the recent Four Seasons picket at the UNO-VEN plant.) And when asked how he should take that statement, Quigley told UNO-VEN to take it "any way they want." Not only did the jury hear this testimony, but it heard a tape recording of Quigley himself repeating these threats to Mike Uremovich, Starcon's president, and thus it was not faced with a swearing contest of who said what, or how it was said. BE&K also provided evidence that Quigley told a UNO-VEN manager that there would be pickets "at UNO-VEN" if BE&K were not removed, and that Quigley told Uremovich that the unions were "coming after you . . . not just on one front." Based on this evidence, a jury could reasonably conclude that the unions threatened Starcon and UNO-VEN with illegal secondary pickets.

The unions' main argument seems to be that because they never outright threatened illegal secondary activities, and never mentioned the Four Seasons dispute by name, the jury could not conclude that they intended such a threat. But a union cannot avoid liability for illegally threatening a secondary employer by conveying the threat with innocuous words, implications and body language. Liability results from the unlawful threat, not from the particular words or gestures used to convey it. *See Pickens-Bond Const. v. United Broth. of Carpenters*, 586 F.2d 1234, 1240-41 (8th Cir.1978) ("The Union's statements, though couched in language having a surface neutrality, were calculated to reinforce and had the necessary effect of reinforcing, the naturally persuasive effects of the

pickets."). Nor can a union avoid liability because the same statement could be reasonably interpreted as both a threat of a legal primary picket and a threat of an illegal secondary picket. Which the union intended is for the jury to decide, and here it concluded that the unions intended the latter. This was a permissible view of the evidence. *See, e.g., Pickens-Bond Const.*, 586 F.2d at 1240 (affirming verdict where unions' statement did not explicitly threaten illegal secondary picket, but when taken in context implied such an intent); *Abreen Corp. v. Laborers' Intern. Union, N.A., AFL, AFL-CIO*, 709 F.2d 748, 755 (1st Cir.1983) (accord); *Texas Distributors, Inc. v. Local Union No. 100, United Assoc. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the U.S. and Canada AFL-CIO*, 598 F.2d 393, 400 (5th Cir.1979) (accord).

To this point in discussing the sufficiency of the evidence, we have treated Local 150 and the Trades Council together, but one issue Local 150 presents on appeal is whether it (as opposed to the Trades Council) made any illegal threats. Local 150 argues that Quigley, who did most of the talking, did so only on behalf of the Trades Council. However, the evidence established that Quigley was also a Local 150 business representative, and a jury could reasonably infer that Quigley made the illegal threats in both capacities, or at a minimum, reasonably appeared to be acting on behalf of Local 150. Moreover, Benefield, who was acting on behalf of Local 150, was present when Quigley made the threats to UNOVEN and did nothing to disavow the threats, or to inform Starcon that Quigley was not at that time acting on behalf of Local 150, thus also ratifying Quigley's conduct. Because a jury could reasonably find that Quigley had

either actual, apparent, or ratified authority to bind Local 150, the verdict against Local 150 stands.

E. Damages

BE&K argued to the jury that the unions' illegal threats of secondary pickets destroyed its ongoing relationship with Starcon and caused Starcon to refuse to subcontract with it any more, costing it $1,500,000 in lost profits. The jury awarded it $544,000. The defendants appeal asserting that BE&K was entitled to nothing, or that the award was excessive and should have been remitted, or a new trial granted.

The defendants first argue that BE&K failed to prove that their illegal threats caused Starcon to terminate its relationship with BE&K. However, Starcon president Uremovich testified that he "made a decision not to use BE&K because of the threats from the unions and the impact that it would have on [his] business." Uremovich further testified that following Quigley's statement that Starcon's relationship with BE&K would send off "international signals," he stopped using BE&K entirely. To counter this testimony, the defendants point to a letter which Uremovich sent to Mobil Oil on November 7, 1995, which stated that Starcon and BE&K are partners "sharing a common goal to service their customers and take care of their people," as proof that their illegal threats did not destroy Starcon and BE&K's relationship. At most, the conflict between the letter and Uremovich's testimony created a jury question regarding causation, and when considered in light of further testimony that Mobil did not want BE&K to work on its project because of what

had happened at UNOVEN, the jury did not act unreasonably in finding that the unions' illegal threats caused Starcon to terminate its relationship with BE&K.

The unions also argue that the damage award cannot stand because to award the plaintiff any damages required the jury to speculate as to whether Starcon would be awarded future jobs. It would then have to speculate as to the number and value of such jobs and whether Starcon would want BE&K to provide the services for those contracts. The unions insist further speculation would be required as to whether BE&K would have sufficient manpower to accept the jobs, and finally as to the profits BE&K would make on the jobs.[5]

While damages cannot be based on pure speculation or guesswork, *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 506 (7th Cir.1992), they also need not be proven with the certainty of calculus. And where, as here, the uncertainty as to the damages stems from the defendants' illegal conduct, the defendants should not benefit from the uncertainty they created: "Speculation has its place in estimating damages, and doubts should be resolved against the wrongdoer." *Mid-America Tablewares, Inc. v.*

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[5] In arguing that the district court erred in excluding the ALJ's decision, the unions assert that that decision was relevant to show that "BE&K's prediction of its receipt of turnaround work from Starcon is nothing more than mere speculation." While the unions present ten separate reasons for overturning the damage award, they did not contend that the ALJ's decision as a matter of law makes any recovery speculative. Nor do we think that is the case, given that the ALJ's decision does not preclude Starcon from hiring BE&K.

Mogi Trading Co., Ltd., 100 F.3d 1353, 1365 (7th Cir.1996) (internal quotations omitted).

In this case, the jury heard evidence that Starcon had hired BE&K for four jobs within the first 15 months of the Master Contract, and that it intended to continue to use BE&K for the next five years. (The jury also heard evidence that contracts such as the Master Contract often last as long as ten years.) Other evidence established that BE&K received a $4.00 per hour profit (actually a $4.00 contribution margin) on labor subcontracted to Starcon. BE&K also testified that it expected to provide 75,000 labor hours per year, and this evidence was supported by other testimony about the large turnaround projects which Starcon regularly performed, and Starcon's long-term working relationships in the Chicago area with at least seven different oil companies. While calculating damages from this testimony required some estimation, it had a basis in fact and cannot be said to be mere guesswork.

Finally, the unions take issue with the components of the damage award. They object to the use of the contribution margin rate of $4.00 (as opposed to a rate reduced by fixed overhead), as well as other details of its calculation. In doing this, however, they are doing nothing more than rearguing their case to us. The jury heard this evidence and apparently accepted the unions' positions in some respects – it awarded only $544,000 as opposed to the requested $1.5 million. That was the jury's duty. They have fulfilled it, and we won't interfere. Accordingly, we also affirm the damage award.

III. Conclusion

Because we conclude that a section 303 claim is governed by the most closely analogous state statute of limitations, BE&K's claim against Local 150 is not time-barred. We also conclude that the district court did not abuse its discretion in admitting some evidence and in excluding other evidence, and as a whole the jury instructions adequately informed the jury of the law. The evidence when considered with all reasonable inferences in the light most favorable to BE&K supports the jury's verdict of liability and its award of damages. We therefore AFFIRM.

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge
SUZANNE B. CONLON

Sitting Judge if Other Than Assigned Judge

Case Number 96 C 1560

Date September 23, 1996

Case Title
BE&K Construction Company v. Will & Grundy Counties Building Trades Council, AFL-CIO

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd-party plaintiff, and (b) state briefly the nature of the motion being presented.]

Motion to Dismiss.

DOCKET ENTRY:

* * *

(10) X [Other docket entry]

Defendant unions' unopposed motion to dismiss the claim asserted under 29 U.S.C. § 158(b)(4)(1)(B) [50-1, 53-1] is granted. The motion is denied in all other respects. Defendants are directed to answer the complaint by October 10, 1996. ENTER MEMORANDUM OPINION AND ORDER.

/s/ Suzanne B. Conlon

* * *

X Notices mailed by judge's staff.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

BE&K CONSTRUCTION COMPANY,	)	
Plaintiff,	)	
vs.	)	No. 96 C 1560
WILL & GRUNDY COUNTIES BUILDING TRADE COUNCIL, AFL-CIO, et al.,	)	Judge Suzanne B. Conlon
Defendants	)	

MEMORANDUM OPINION AND ORDER

Plaintiff BE&K Construction Company ("BE&K") sues Will & Grundy Counties Building Trades Council, AFL-CIO, United Association of Plumbers & Pipefitters Locals 422 and 597, International Union of Operating Engineers Local 150, and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers Local 1 (collectively "the unions"). Count I of the complaint asserts a claim under Section 303 of the Labor Management Relations Act of 1947, as amended ("the LMRA"), 29 U.S.C.A. § 187 (1978). Counts II and III assert state law claims for tortious interference with a contract and tortious interference with prospective economic advantage. Defendants Association of Plumbers & Pipefitters Local 422 ("Local 422") and International Union of Operating Engineers Local 150 ("Local 150") move to dismiss the action pursuant to Fed.R.Civ.Pro. 12(b)(1) and 12(b)(6).

BACKGROUND

On a motion to dismiss, the court must accept well-pleaded factual allegations of the complaint as true and view those allegations in the light most favorable to the plaintiff. *Gillman v. Burlington Northern R. Co.*, 878 F.2d 1020, 1022 (7th Cir. 1989). BE&K is a provider of construction services. BE&K had a contractual relationship with Starcon, Inc. ("Starcon"), a provider of mechanical and structural maintenance services. Pursuant to this contract, BE&K rendered services as a subcontractor to Starcon on an ongoing, as-needed basis. In late August or early September 1995, Starcon issued a work order to BE&K, for a job at UNO-VEN Company's ("UNO-VEN") Lemont, Illinois refinery. BE&K was an approved subcontractor under the contract between Starcon and UNO-VEN for Starcon's services at the Lemont refinery.

By September 18, 1995, approximately twenty-five to thirty BE&K employees were at the refinery performing work for Starcon. On or about this date, the unions informed representatives of UNO-VEN and Starcon that the unions did not approve of BE&K's presence at the refinery and wanted BE&K removed. The unions threatened to interfere with the business and operations of both UNO-VEN and Starcon, by use of violence and illegal picketing unless BE&K was removed. This interference was part of the unions' efforts to drive BE&K out of business, at least in Illinois.

Because of the unions' threats, UNO-VEN instructed Starcon to remove BE&K from the Lemont refinery. In addition, the threats induced Starcon to remove BE&K and to stop issuing work orders to BE&K under their

contract. These actions caused injury to BE&K's business and property. BE&K filed suit on March 18, 1996.

DISCUSSION

I. Count I

A. The Rule 12(b)(6) Standard

Generally, the federal system of notice pleading does not favor dismissal for failure to state a claim. *Gray v. Dane County*, 854 F.2d 179, 182 (7th Cir. 1988). Under Rule 12(b)(6), the court accepts all well-pleaded factual allegations in the complaint as true, *Ezekiel v. Michel*, 66 F.3d 894, 897 (7th Cir. 1995), and views the allegations in the light most favorable to the plaintiff. *Badger Pharmacal, Inc. v. Colgate-Palmolive Co.*, 1 F.3d 621, 626 (7th Cir. 1993). Dismissal is proper only if the plaintiff can prove no set of facts in support of its claims that would entitle it to the relief requested. *Illinois Health Care Ass'n v. Illinois Dep't of Public Health*, 879 F.2d 286, 288 (7th Cir. 1989).

B. Sufficiency of the Complaint

Count I asserts a claim pursuant to section 303 of the LMRA, 29 U.S.C.A. § 187. Section 303 provides a cause of action for damages to those injured by a labor organization which engages in "any activity or conduct defined as unfair labor practice in section 158(b)(4) of this title." 29 U.S.C.A. § 187. Section 158(b)(4) states, in relevant part:

> It shall be an unfair labor practice for a labor organization or its agents – . . .
>
> (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting

> commerce, where in either case an object thereof is . . .
>
> (B) forcing or requiring any person . . . to cease doing business with another person . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or picketing activity[.][1]

The purpose of 158(b)(4) is to preserve the right of labor organizations to directly pressure employers with whom they have a primary dispute, while shielding third parties (usually "secondary employers") not directly involved. *Helgesen v. International Association of Bridge, Structural & Ornamental Ironworkers, Local Union 498*, 548 F.2d 175, 180 (7th Cir. 1977). Merely threatening a secondary employer with unlawful activity to compel it to cease doing business with the primary employer is actionable. *National Labor Relations Board v. Servette*, 377 U.S. 46, 53-54 (1964).

Locals 150 and 422 maintain that in spite of liberal federal pleading rules, BE&K's complaint does not sufficiently set forth any unlawful activity. Motion to dismiss at 7. Without presenting the specific statements alleged to be threatening, the complaint does not allow "the Court to engage in any sort of rational analysis." *Id.* The locals' argument is without merit.

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[1] Count I also asserts a claim pursuant to section 303 for violation of 158(b)(4)(i)(B). First amended complaint ¶¶ 22, 24. However, in its response to the motion to dismiss, BE&K states it "is not asserting a violation of 29 U.S.C. § 158(b)(4)(i)(B) in this case." Response at 6. Accordingly, the locals' unopposed motion to dismiss the 158(b)(4)(i)(B) claim in Count I is granted.

The complaint specifically alleges that the unions threatened Starcon and UNO-VEN with "violence and illegal picketing" to induce BE&K's removal. First amended complaint ¶¶ 17, 18. Under the federal rules there is no need for a more detailed statement. *See Strauss v. City of Chicago*, 760 F.2d 765, 767 (7th Cir. 1985) ("mere vagueness or lack of detail does not constitute sufficient grounds for a motion to dismiss"). The complaint clearly alleges facts sufficient to support a cause of action under 29 U.S.C.A. §§ 187 and 158(b)(4)(ii)(b).[2] Accordingly, the motion to dismiss Count I for failure to state a claim is denied.

C. Statute of Limitations

Locals 150 and 422 also assert that the Count I is timebarred. Motion to dismiss at 8. Generally, where the defendant relies solely on the pleadings in moving to dismiss a claim for failure to satisfy the limitations period, the motion is governed by Rule 12(b)(6). *Tragenza v. Great American Communications Co.*, 12 F.3d 717, 718 (7th

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[2] Each of the cases cited by Locals 150 and 422 in support of their argument that the complaint is inadequate is distinguishable. Unlike BE&K, the plaintiffs in the cited cases each failed to allege an element of their respective causes of action. *See Mescall v. Burrus*, 603 F.2d 1266, 1271 (7th Cir. 1979) (failure to allege any purposeful discrimination for a claim under 42 U.S.C.A. §§ 1981 and 1983; *Coates v. Illinois State Board of Education*, 559 F.2d 445, 447 (7th Cir. 1977) (failure to allege causation under 42 U.S.C.A. § 2000(d); *Cohen v. Illinois Institute of Technology*, 384 F. Supp. 202 (N.D.Ill. 1974) (failure to allege state action in claim under the Fourteenth Amendment and 42 U.S.C.A. § 1983).

Cir. 1993). Section 187 does not provide a limitations period. When no federal statute of limitations expressly applies to a federal cause of action, courts generally apply the most analogous statute of limitations under local state law. *DelCostello v. International Brother of Teamsters*, 462 U.S. 151, 158 (1983); *Wilson v. Garcia*, 471 U.S. 261, 266 (1985). However, Section 187 provides that suits under the section are "subject to the limitations and provisions of section 185 of this title[.]" 29 U.S.C.A. 187. In *DelCostello*, the Supreme Court held that 29 U.S.C.A. 160(b), which establishes a six-month limitation period for filing charges of unfair labor practices with the National Labor Relations Board, applied to a suit under 29 U.S.C.A. § 185.

Locals 150 and 422 argue that since the "limitations and provisions" of Section 185 apply to section 187, 160(b) should also govern suits under Section 187. Every circuit court to consider this question has reached the opposite conclusion. *See Prater v. United Mine Workers of America, Districts 20 and 23*, 793 F.2d 1201, 1209-10 (11th Cir. 1986); *Carruthers Ready-Mix, Inc. v. Cement Masons Local Union No. 520*, 779 F.2d 320, 327 (6th Cir. 1986); *Monarch v. Soft Drink Workers, Local 812*, 762 F.2d 228, 231 (2nd Cir. 1985). In rejecting application of the Section 160(b) period to Section 187, the Second Circuit reasoned that Section 187 suits "simply do not implicate the same concerns" as suits brought pursuant to Section 185. *Monarch*, 762 F.2d at 231. Although both involve the commission of unfair labor practices, Section 185 governs suits involving the violation of labor contracts. The parties involved in those suits have an on-going contractual relationship. However, "[t]he dispute upon which liability is

predicated [under Section 187] is not a collective bargaining dispute; it does not arise within the context of a labor-management relationship" as do suits under Section 185. *Id.* Section 187 suits are between unrelated parties. Thus, "labor peace will not be disrupted if section [187] suits are not rapidly resolved." *Id.* The Second Circuit also noted the *DelCostello* Court's statement that the general practice of borrowing limitations periods from state law for federal causes of action should still be the norm. *Monarch*, 762 F.2d at 231 (quoting *DelCostello*, 462 U.S. at 171).

In addressing the meaning of Section 187's explicit reliance on the provisions of section 185, the Sixth Circuit held that this statement only refers to the express limitations set forth in Section 185 regarding jurisdiction, agency, venue, service of process and enforcement of judgements, not the judicially implied statute of limitations. *Carruthers Ready-Mix*, 779 F.2d at 326 n.3.

Although the Seventh Circuit has never directly addressed this issue,[3] two judges of this court reached the same conclusion as the Second, Sixth, and Eleventh Circuits. *See J. Pease Construction Co., Inc. v. Local 150, International Union of Operating Engineers*, No. 87 C 10515, 1992 WL 77731 at 3-4 (N.D. Ill. April 7, 1992) (Nordberg, J.)

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[3] In *Landgrebe Motor Transport v. District 72, Int'l Ass'n of Machinists & Aerospace Workers*, 763 F.2d 241 (7th Cir. 1985), the Seventh Circuit considered the possibility that the six-month period of 160(b) might apply to Section 187 suits. *Id.* at 244 n.1. However, because Section 187's limitations period was not at issue, the Court expressly refrained from settling the question. *Id.*

(citing *Monarch, Carruthers,* and *Prater*); *Park Electric Company v. International Brotherhood of Electrical Workers, Local 701,* 593 F. Supp. 1060, 1064 (N.D. Ill. 1984) (Plunkett, J.).

The reasoning of the foregoing decisions is persuasive: the limitations period in Section 160(b) is not applicable to suits under Section 187. As to the period of limitations that should apply here, the Illinois's five-year statute of limitations for actions in tort, 735 ILCS 5/13-205 (1992), is the most analogous to Section 187 claims. *Park Electric,* 593 F. Supp. at 1065; *J. Pease Construction,* 1992 WL 77731 at 4. Since the complaint alleges the unlawful actions of the unions occurred in September 1995, and this suit was filed on March 18, 1996, Count I is not time-barred.

II. Counts II and III

A. General Preemption

In Counts II and III, BE&K asserts state law claims for tortious interference with contract and tortious interference with prospective economic advantage. Locals 150 and 422 move to dismiss Counts II and III on preemption grounds.

When conduct is arguably prohibited or protected by federal labor law, the general rule is that otherwise applicable state law and procedure are preempted. *See Farmer v. United Brotherhood of Carpenters & Joiners,* 430 U.S. 290, 296 (1977); *Teamsters, Chauffeurs & Helpers Union v. Morton,* 377 U.S. 252, 257-60 (1964). Exceptions to this general rule exist where states have a traditional and compelling interest in regulating conduct and the regulation will not

compromise the goals of federal labor law. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959). For example, "[p]olicing of actual or threatened violence to persons . . . has been held most clearly a matter for the states." *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 136 (1976). *Accord Farmer*, 430 U.S. at 299; *Automobile Workers v. Russell*, 356 U.S. 634, 640 (1958); *Cannon v. Edgar*, 33 F.3d 880, 884 (7th Cir. 1994) (quoting *Lodge 76*, 427 U.S. at 136).

Although BE&K alleges the unions used "threats of violence", against both Starcon and UNO-VEN, Locals 150 and 422 assert preemption applies because tortious interference with contract and prospective economic advantage claims merely involve economic harm, not personal injury. Locals 150 and 422 cite to *Ehredt Underground, Inc. v. Commonwealth Edison Co.*, 830 F. Supp. 1083, 1096 (N.D. Ill. 1993), where the court held that because the "state does not have an overriding concern in regulating economic loss caused by labor disputes," state-law claims for tortious interference with the right of contract and prospective economic advantage are preempted by 29 U.S.C.A. § 158(b)(4)(C).

However, in *Mi-Jack Products v. International Union of Operating Engineers, Local 150*, 94 C 6676, 1995 WL 42066 at 2 (N. D. Ill. Jan 31, 1995), this court held that a claim for tortious interference with contract is not preempted where the plaintiff alleges the defendant used violence or the threat of violence. *See also Park Electric Company v. International Brotherhood of Electrical Workers Local 701*, 540 F. Supp. 779, 782 (N.D. Ill. 1982) (tortious interference with contract and other business-related torts are preempted by federal law unless "violent conduct or threat

of such conduct is alleged"); *Cannon*, 33 F.3d at 884 (holding that federal labor law does not preempt traditional common law torts or regulations involving "public safety"). Locals 150 and 422 do not provide any further support for their argument that the nature of the injury alleged is relevant to the question of preemption. Therefore, this court applies its holding in *Mi-Jack*. Accordingly, Locals 150 and 422's motion to dismiss Counts II and III on preemption grounds is denied.

B. The Norris-LaGuardia Act

Locals 150 and 422 maintain Counts II and III should be dismissed because these claims fail to state a cause of action under Section 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106. The argument is meritless.

Section 6 provides that no labor organization "shall be held responsible or liable for the unlawful acts of individual officers, members or agents, except upon *clear proof* of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof." 29 U.S.C. § 106. This section requires plaintiffs to meet a higher burden of proof than preponderance of the evidence when suing unions. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 737 (1966). To survive a motion to dismiss, a plaintiff need only show he is entitled to relief on some set of facts consistent with the allegations that *could* be proved. *Venture Associates v. Zenith Data Systems*, 987 F.2d 429, 432 (7th Cir. 1993). BE&K alleges that Locals 150 and 422 "by and through their agents" threatened Starcon and UNO-VEN with violence and unlawful picketing if BE&K was not removed

from the Lemont refinery. First amended complaint ¶¶ 17, 18. If BE&K proves these allegations, as the Norris-LaGuardia act requires, it will be entitled to relief. Accordingly, the unions' motion to dismiss is denied.[4]

III. Conclusion

Defendant unions' unopposed motion to dismiss the claim asserted under 29 U.S.C. § 158(b)(4)(1)(B) in Count I is granted. The motion is denied in all other respects. Defendants are directed to answer the complaint by October 10, 1996.

ENTER:

/s/ Suzanne B. Conlon
Suzanne B. Conlon
United States District Judge

September 23, 1996

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[4] In its motion to dismiss, Local 422 refers to an affidavit submitted by Gary Blankenship, the president of Local 422. Motion to dismiss at 15 n.3. Blankenship attests that Local 422 has no interest in BE&K's presence at the Lemont refinery because the refinery is not in Local 422's specific jurisdiction. *Id.* The affidavit may not properly be considered at this juncture.

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge
SUZANNE B. CONLON

Sitting Judge if Other Than Assigned Judge

Case Number 96 C 1560

Date June 17, 1997

Case Title
BE&K Construction Company v. Will & Grundy Counties Building Trades Council, AFL-CIO, et al.

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd-party plaintiff, and (b) state briefly the nature of the motion being presented.]

Defendants' Motions for Judgment as a Matter of Law, New Trial, and Remittitur.

DOCKET ENTRY:

* * *

(10) X [Other docket entry]

Defendants' motions for judgment as a matter of law [219-1], new trial [221-1], and remittitur [223-1] are denied. ENTER MEMORANDUM OPINION AND ORDER.

/s/ Suzanne B. Conlon

* * *

X Notices mailed by judge's staff.

X order attached to

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BE&K CONSTRUCTION COMPANY,	)	
Plaintiff,	)	No. 96 C 1560
v.	)	Judge Suzanne B. Conlon
WILL & GRUNDY COUNTIES BUILDING TRADES COUNCIL, AFL-CIO, et al.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff BE&K Construction Company ("BE&K") sues Will & Grundy Counties Building Trades Council, AFL-CIO ("Trades Council") and International Union of Operating Engineers Local 150 ("Local 150") (collectively "defendants") for illegal threats under section 303 of the Labor Management Relations Act of 1947, as amended ("the LMRA"), 29 U.S.C. § 187 (1978). At trial, the jury returned a verdict in favor of BE&K and against the Trades Council and Local 150 in the amount of $544,000. Defendants move for remittitur, new trial, and judgment as a matter of law.

BACKGROUND

The background facts of this case are stated more fully in the court's Memorandum Opinion and Order of February 20, 1997. *BE&K Construction Co. v. Will & Grundy*

Counties Building Trades Council, 96 C 1560, 1997 WL 102549 (Feb. 20, 1997). In 1994, BE&K and Starcon, Inc. ("Starcon") entered into an independent contractor relationship. Pursuant to the contract, BE&K agreed to provide labor for Starcon projects. In 1995, Starcon asked BE&K to assist with a project at UNO-VEN. Starcon subsequently removed BE&K from the UNO-VEN job.

In 1996, BE&K brought suit against numerous local labor unions claiming the unions made illegal threats that resulted in BE&K's loss of the UNO-VEN project and other Starcon business. By February 20, 1997, two defendants remained in the suit: Local 150 and the Trades Council. The only issue remaining for trial was whether defendants violated the LMRA by making illegal threats. At trial, the court denied defendants' motion for a directed verdict. On April 1, 1997, the court entered judgment on the jury verdict in favor of BE&K in the amount of $544,000. On April 15, 1997, defendants filed the motions at issue here.

DISCUSSION

I. MOTION FOR JUDGMENT AS A MATTER OF LAW

In deciding whether to grant a motion for judgment as a matter of law, a court must determine "whether the evidence presented, combined with all reasonable inferences permissibly drawn therefrom, is sufficient to support the verdict when viewed in a light most favorable to the party to whom the motion is directed." *Creative Demos, Inc. v. Wal-Mart Stores, Inc.*, 955 F. Supp. 1032, 1036 (S.D. Ind. 1997) (quoting *Cygnar v. City of Chicago*, 865

F.2d 827, 834 (7th Cir. 1989)). The court will grant the motion "only when there can be but one conclusion from the evidence." *Id.* (quoting *Emmel v. Coca-Cola Bottling Co. of Chicago*, 95 F.3d 627, 636 (7th Cir. 1996)). The court may not weigh the evidence, reexamine the credibility of witnesses, or substitute its judgment of the facts. *Id.* (citing *Rakovich v. Wade*, 850 F.2d 1180, 1188 (7th Cir. 1988)). "If the evidence, taken as a whole, provides a sufficient probative basis upon which a jury could reasonably reach a verdict, without speculation over legally unfounded claims, the motion should be denied." *Id.* (citing *Cygnar*, 865 F.2d at 835).

Section 303 of the LMRA, 29 U.S.C. § 187, provides a cause of action for parties injured by a labor organization engaging in "any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title." 29 U.S.C. § 187. Section 158(b)(4) states, in relevant part:

> It shall be an unfair labor practice for a labor organization or its agents – . . .
>
> (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . .
>
> (B) forcing or requiring any person . . . to cease doing business with any other person . . . Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or picketing activity[.][1]

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[1] The court granted an unopposed motion to dismiss BE&K's claim under 29 U.S.C § 158(b)(4)(i)(B) on September 23, 1996.

29 U.S.C § 158(b)(4). The purpose of section 158(b)(4) is to preserve the right of labor organizations to pressure employers with whom they have a primary dispute, while shielding third parties (usually "secondary employers") not directly involved. *Helgesen v. International Association of Bridge, Structural & Ornamental Ironworkers, Local Union 498*, 548 F.2d 175, 180 (7th Cir. 1977). Merely threatening a secondary employer with unlawful activity to compel it to cease doing business with the primary employer is actionable. *National Labor Relations Board v. Servette, Inc.*, 377 U.S. 46, 53-54 (1964).

BE&K alleges Trades Council president Michael Quigley ("Quigley") and Local 150 business representative Gary Benefield ("Benefield") made illegal threats to UNO-VEN and Starcon in order to prevent BE&K, which some union members perceive as a "strike breaking firm," from working on UNO-VEN and Starcon projects. In particular, BE&K claims defendants illegally threatened UNO-VEN and Starcon with secondary pickets and that the threats resulted in a loss of business under the Starcon-BE&K independent contractor agreement.

Defendants contend plaintiffs were unable to prove the existence of illegal threats at trial. However, plaintiffs provided a taped conversation between Quigley and Mike Uremovich ("Uremovich"), Starcon's president. During that conversation, Quigley described a meeting at which he told UNO-VEN managers that if BE&K were not removed from the UNO-VEN project, UNO-VEN could "expect a lot more serious problems than they've had in the past." Tr. 304. Quigley told UNO-VEN to take that statement "any way they want." Pl. Ex. 27 at 13. Plaintiffs also provided evidence that when Quigley made these

statements, Local 150 had recently been accused of secondary pickets at a UNO-VEN facility. Tr. 217-218. Both Benefield and Quigley were familiar with the previous dispute and knew how it was viewed by UNO-VEN. *Id.* at 217-220, 223-224. Benefield was at the UNO-VEN meeting and did nothing to disavow Quigley's statements. *Id.* 215-16, 493. Moreover, plaintiffs provided evidence Quigley told a UNO-VEN manager there would be pickets "at UNO-VEN" if BE&K were not removed. *Id.* at 282-83. The jury also heard that Quigley told Uremovich the unions were "coming on after [Uremovich] on more than one front. . . . " *Id.* at 308. Finally, Uremovich testified that BE&K was removed from the Starcon-UNO-VEN project because of threats by the Trades Council and Local 150. *Id.* at 93-94. Based on this evidence, the jury reasonably concluded Quigley's comments were intended to convey a threat of illegal activity.

Defendants claim they have provided evidence that defendants' statements and actions do not constitute illegal threats. For example, defendants note Quigley testified that his statement about "more serious problems" did not refer to the previous incident between Local 150 and UNO-VEN. However, a reasonable jury could conclude the statement did refer to the previous incident. Moreover, even though the previous incident was not proven to be illegal, the statement about BE&K causing "more" problems than the previous incident is sufficient for a jury to conclude Quigley threatened illegal activity.

The issue here is not whether the jury could have reasonably found in defendants' favor. The issue is whether the jury's actual decision was reasonable. As suggested by the evidence described above (and in the

court's February 20 opinion considering defendants' motions for summary judgment), BE&K has provided sufficient evidence for a reasonable jury to conclude defendants made illegal threats. Defendants and plaintiffs both provided evidence in support of their interpretations of defendants' actions and statements. The jury simply found plaintiffs' version more credible. Those determinations are not subject to review in a motion for judgment as a matter of law. *Rakovich*, 850 F.2d at 1188 (court may not weigh the evidence, reexamine the credibility of witnesses, or substitute its view of the facts).

Alternatively, defendants argue that even if Quigley made threats against Starcon, those threats were directed at a primary business; defendants claim Starcon and BE&K were partners or joint venturers. However, pursuant to the contract between BE&K and Starcon, BE&K was an *independent contractor* who provided Starcon with skilled labor as needed. Pl. Ex. 2, Articles I and XI. In addition to this explicit language, the contract provides for payments to BE&K on a per hour basis; it does not provide for a sharing of profits. *Id.* at Article III. Thus, it was not unreasonable for the jury to reject defendants' theory that BE&K and Starcon were partners or joint venturers. *Hallmark Insurance Administrators, Inc. v. Colonial Penn Life Insurance* Co., 697 F. Supp. 319, 326 (N.D. Ill. 1988).

Next, defendants argue that even if Quigley made illegal threats, BE&K has not shown why Local 150 is responsible for those threats. In particular, defendants argue that Quigley was acting only in his capacity as president of the Trades Council at the time of the threats. However, the jury reasonably concluded that Quigley, as

Local 150's business representative, was acting within the scope of his authority when meeting with UNO-VEN and Starcon. Tr. 118, 119, 246. Moreover, Benefield, who was clearly acting within the scope of his role as a Local 150 business representative, was present when Quigley made the threats to UNO-VEN and appeared to support Quigley. *Id.* at 216-17, 493. Thus, the jury reasonably concluded that Local 150 is responsible for Quigley's illegal threats either directly or through Benefield's ratification.

Finally, defendants argue that BE&K did not provide sufficient evidence to support the jury's damages award. Defendants note that Jack Tadlock ("Tadlock"), the witness upon whom BE&K relied to show its lost profits, is not an accountant, has never studied accounting, and has used no generally accepted accounting principles in making his lost profit projections. *Id.* at 432-33. Defendants contend the jury's damages award cannot rely on speculative projections. Defendants conclude BE&K should be limited only to the damages it sustained with respect to the loss of the UNO-VEN job, not other jobs it might have done for Starcon.

Damages are impermissibly speculative only if they have absolutely no basis in fact. *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 383 (7th Cir. 1986). Here, Tadlock's testimony was based on his experience as a BE&K manager and his experience with the type of contract entered into between BE&K and Starcon. Tr. 385-91. He testified that BE&K historically makes a profit of between $4.00 and $5.00 an hour. *Id.* at 388, 523; Pl. Ex 3. Tadlock had already begun planning for a large turn-around project with Starcon at Mobil and

projected a need for 60,000 man hours. Tr. 402-03. Moreover, Tadlock estimated the future work BE&K would have with Starcon based on his conversations with Uremovich. *Id.* at 403-404. According to these estimates, which suggested $11,000,000 in gross revenue, Tadlock concluded that BE&K lost $1,400,000 in profits because of Starcon's decision not to give BE&K additional work. *Id.* at 405. While these estimates are based on projections that are not scientifically certain, the court cannot conclude that they are entirely speculative. The existence of the Starcon contract combined with Tadlock's testimony about past profits and Uremovich's estimation of BE&K's projected business with Starcon is sufficient to support the jury's verdict. *See, e.g., Mid-America Tablewares, Inc. v. Mogi Trading Co., Ltd.*, 100 F.3d 1353, 1367 (7th Cir. 1996); *see also, Rizzo v. Mr. Coffee*, 94 C 5825, 1995 WL 571500, at *6 (N.D. Ill. Sept. 25, 1995) (testimony by an individual that he or she would have hired plaintiff is sufficient evidence of lost profit to warrant damages); *aff'd*, 105 F.3d 338 (7th Cir. 1997).

Defendants respond that BE&K failed to show Starcon's decision not to use BE&K was the result of defendants' threats. Defendants note that Starcon promoted its relationship with BE&K to other businesses even after the alleged threats. Nonetheless, the jury could have reasonably given little weight to this fact and found Starcon ultimately did not use BE&K because of defendants' threats.

Defendants rely on *Matson Plastering Company, Inc. v. Plasterers and Shophands Local 66, Operative Plasterers and Cement Masons Intern. Ass'n of the U.S. and Canada*, 852 F.2d 1200, 1203 (9th Cir. 1988), which holds that damages

for lost opportunities to bid on future projects are too speculative. However, BE&K had an actual contract with Starcon to work as an independent contractor, and Starcon's president had given BE&K strong indications that BE&K would be awarded certain jobs pursuant to that contract. Tr. 402-05. Thus, BE&K's lost profits are significantly less speculative than the damages sought in cases like *Matson*. *See, e.g., George Hoffman & Sons, Inc. v. International Brotherhood of Teamsters Local No. 627*, 617 F.2d 1234, 1247 (7th Cir. 1980). Accordingly, defendants' motion for judgment as a matter of law must be denied.

II. MOTION FOR REMITTITUR

A court should grant a motion for remittitur only if the damages awarded are "monstrously excessive" or "bear[ ] no rational connection to the evidence." *Miksis v. Howard*, 106 F.3d 754, 764 (7th Cir. 1997) (citing *Littlefield v. McGuffey*, 954 F.2d 1337, 1348 (7th Cir. 1992)). As explained above, BE&K provided sufficient evidence for the jury to award damages based on lost profits. While defendants correctly point out that BE&K's estimates were to some extent uncertain, the jury appears to have taken this uncertainty into account by awarding BE&K a fraction of the amount it sought. In light of the evidence presented, the court cannot conclude the jury's damages award was monstrously excessive or irrational. BE&K's damages evidence might not have been sophisticated, but it did not insult the court's intelligence. *Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410, 415 (7th Cir. 1992).

III. MOTION FOR NEW TRIAL

In order to receive a new trial, defendants must show the jury's verdict was against the weight of the evidence, the damages were excessive, or the trial was unfair. Fed. R. Civ. P. 59(a); *Scaggs v. Consolidated Rail Corp.*, 6 F.3d 1290, 1293 (7th Cir. 1993). A court examines the evidence in the light most favorable to the prevailing party and will not set aside the jury's verdict if there is a reasonable basis in the record supporting the verdict. *Allison v. Ticor Title Ins. Co.*, 979 F.2d 1187, 1196 (7th Cir. 1992).

Defendants' arguments do not demonstrate the jury's verdict was against the manifest weight of the evidence. For the reasons explained above, BE&K provided sufficient evidence to find defendants made illegal threats and suffered damages in the amount of $544,000. The record provides ample support for these findings.

Defendants contend Uremovich's testimony was not credible. First, many of the claimed inconsistencies in Uremovich's testimony are not inconsistent at all. For example, defendants claim Uremovich's projection of giving BE&K 12 million dollars in business between 1996 and 2000 was incredible in light of his inability to describe how many BE&K employees would be working in March and April of 1997. However, Uremovich's ability to predict BE&K's work for a particular two month period is arguably much more difficult than measuring the amount of work that would be produced over a substantially longer period of time. Moreover, BE&K impeached Quigley on important aspects of his story. Thus, even if Uremovich's story was at times inconsistent, the court cannot conclude that the jury's credibility

determinations were against the manifest weight of the evidence.

Defendants next argue that the court erroneously excluded evidence of an Administrative Law Judge's report in *Starcon, Inc. v. International Brotherhood of Boilermakers,* No. 13-CA-32719 (NLRB Dec. 27, 1996). Defendants claim the report is relevant because: (1) it shows Uremovich is not neutral with respect to labor unions, (2) it demonstrates the close relationship between Starcon and BE&K, (3) it explains the statements made on an audio tape, (4) it is relevant to damages. At trial, the court properly noted that the report, which involved different parties and was not yet a final determination of the National Labor Relations Board ("NLRB"), was only marginally relevant. Tr. 414-415. The court found this relevance was substantially outweighed by the prejudice the decision would cause. Namely, the report would have raised collateral issues, including Starcon's numerous objections to the report. Moreover, Uremovich was cross-examined about the NLRB proceeding, so the report would have been cumulative as to Uremovich's neutrality and the comments on the audio tape. *Id.* at 137-39.

Defendants next contend the court erred in not admitting a Starcon newsletter that expressed an anti-union slogan; defendants argue the letter was relevant in showing Uremovich's attitude toward unions. However, the court rejected the evidence for failure to lay a proper foundation. *Id.* at 331-36. Defendants have not explained how this basis for excluding the newsletter was erroneous.

Defendants also argue the court erred in admitting evidence concerning picketing at Four Seasons. Defendants claim this picket had no relevance because there was no evidence Quigley or Benefield intended to refer to this incident at the UNO-VEN meeting. However, Quigley's statement about UNO-VEN having more serious problems than it had in the past made this prior incident relevant. In particular, Quigley and Benefield were aware of the Four Seasons dispute, and they knew that UNO-VEN believed the incident involved an unlawful picket. *Id.* at 217-224. Under these circumstances, the Four Seasons incident was relevant to determining the meaning of Quigley's statement.

Defendants claim the court should have admitted a videotape about BE&K's labor practices. Defendants claim the videotape was relevant in assessing the communications that occurred between defendants, UNO-VEN, and Starcon. Defendants also claim the videotape was relevant in rebutting BE&K's claim about being one of the top one hundred employers in America. However, the court properly ruled the videotape consisted of union propaganda and contained hearsay upon hearsay. *Id.* at 596. Any probative value of the videotape was substantially outweighed by its prejudicial effect. Fed. R. Evid. 403.

Finally, defendants argue the court failed to give proper jury instructions and verdict forms. First, defendants claim the jurors were given insufficient guidance as to what constitutes illegal threats under the LMRA. In particular, defendants assert the court failed to instruct the jury that a union can legally inform a secondary employer that the union intends to engage in primary

picketing. Defendants also claim the court improperly instructed the jury that defendants' conduct is unlawful "so long as one of the union's objectives was to influence the secondary employer to bring pressure to bear on the primary employer. . . . " Tr. at 729. However, the jury instructions clearly indicated that federal law protects the right of a labor union to picket against an employer with whom it has a primary dispute. *Id.* at 728-29.

Defendants next argue the court should have instructed the jury that use of the word "problems" does not constitute an illegal threat. However, as the previous discussion makes clear, defendants went beyond a mere reference to potential problems. Thus, an instruction about the strictly benign use of the words "problem" or "trouble" would have been misleading and inappropriate.

Defendants also contend the court erred in omitting an instruction as to whether Starcon was a secondary employer. However, for the reasons explained earlier, defendants had insufficient evidence to claim BE&K and Starcon engaged in a joint venture. The only reasonable conclusion based on the evidence is that BE&K and Starcon had an independent contractor relationship.

Defendants also complain the verdict forms did not allow for the separation of damages for primary and secondary threats. However, defendants never objected to the use of these verdict forms at trial. Moreover, the record provides no evidence that the jury considered lawful conduct in computing damages. The jury instructions made clear the type of conduct for which damages

could be awarded. Accordingly, defendants' motion for a new trial must be denied.

CONCLUSION

Defendants' motions for judgment as a matter of law, new trial, and remittitur are denied.

ENTER:

/s/ Suzanne B. Conlon
Suzanne B. Conlon
United States District Judge

June 17, 1997

APPENDIX B

Statutes Involved

Section 1 of the Labor Management Relations Act, as amended, 61 Stat. 136, 29 U.S.C. § 141 is as follows:

§ 141. Short title; Congressional declaration of purpose and policy

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employer, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

Section 1 of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. § 151 is as follows:

§ 151. Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain

collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 8(b) of the National Labor Relations Act, as amended, 61 Stat. 140, 29 U.S.C. § 158(b) is as follows:

§ 158. Unfair labor practices
(b) Unfair labor practices by a labor organization

It shall be an unfair labor practice for a labor organization or its agents –

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to

threaten, coerce, or restrain any person engaged in commerce or in any industry affecting commerce, where in either case an object thereof is -

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or

in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement, authorized under subsection (a)(3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the

circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty

days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (c) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

Section 8(e) of the National Labor Relations Act, as amended, 61 Stat. 140, 29 U.S.C. § 158(e) is as follows:

§ 158. Unfair labor practices
(e) Enforceability of contract or agreement to boycott any other employer; exception

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any

of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible [sic] and void; *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

Section 10(b) of the National Labor Relations Act, as amended, 61 Stat. 140, 29 U.S.C. § 160(b) is as follows:

§ 160. Prevention of unfair labor practices
(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency

designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

Section 10(l) of the National Labor Relations Act, as amended, 61 Stat. 140, 29 U.S.C. § 160(l) is as follows:

§ 160. Prevention of unfair labor practices
(l) Boycotts and strikes to force recognition of uncertified labor organizations; injunctions; notice; service of process

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective

for no longer than five days and will become void at the expiration of such period: *Provided further,* That such officer or regional attorney shall not apply for any restraining order under section 158(b)(7) of this title if a charge against the employer under section 158(a)(2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b)(4)(D) of this title.

Section 10(m) of the National Labor Relations Act, as amended, 61 Stat. 140, 29 U.S.C. § 160(m) is as follows:

§ 160. Prevention of unfair labor practices
(m) Priority of cases

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section

158 of this title, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (l) of this section.

Section 301 of the Labor Management Relations Act, as amended, 61 Stat. 156, 29 U.S.C. § 185 is as follows:

§ 185. Suits by and against labor organizations
(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena [sic], or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Section 303 of the Labor Management Relations Act, as amended, 61 Stat. 158, 29 U.S.C. § 187 is as follows:

§ 187. Unlawful activities or conduct; right to sue; jurisdiction; limitations; damages

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason or[1] any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

(June 23, 1947, c. 120, Title III, § 303, 61 Stat. 158; Sept. 14, 1959, Pub.L. 86-257, Title VII, § 704(e), 73 Stat. 545.)

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[1] So in original. Probably should read "of."